Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CELLULAR PHONE TASKFORCE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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September, 2000

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QUESTIONS PRESENTED

1. Whether an agency other than the Environmental Protection Agency can be excused in its rulemaking from compliance with National Environmental Policy Act procedures by use of the "functional compliance" doctrine.

2. Whether, consistent with both the Administrative Procedures Act and the National Environmental Policy Act, an agency without expertise in health matters can engage in rulemaking without submitting significant health-related comments and evidence to the federal agencies concerned with health and safety matters, and do so on the grounds that, despite its lack of expertise, it does not believe the comments or evidence significant enough for such a submission.

3. Whether, consistent with the delegation provisions of the federal Constitution, Congress can delegate to a federal agency the power to set national standards for a pervasive industry, the effects of whose operations are experienced by all, without choice, with entirely standardless delegation legislation.

4. Whether federal agency rulemaking, mandated by an act of Congress, which preempts local governmental zoning decisions related to health and safety, constitutes a "program or activity" under the Rehabilitation Act, requiring adherence to its provisions.

PARTIES TO THE PROCEEDING

In this Court, the Petitioner filing this Petition is the Cellular Phone Taskforce, a non-profit, public interest corporation incorporated in New York.

The parties plaintiff to the proceeding in the Court of Appeals were: CELLULAR PHONE TASKFORCE, AD-HOC ASSOCIATION OF PARTIES CONCERNED ABOUT THE FEDERAL COMMUNICATIONS COMMISSION RADIO FREQUENCY HEALTH AND SAFETY RULES, DAVID FICHTENBERG, CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, JOHN BARDIS, ERICA ZWEIG, of Telecommunications Master Plan Coalition of San Francisco, CHRISTOPHER BEAVER, of Noe Valley Families Against the Antennas, MAJOR BELKIN, DONNA CASEY, MAGGIE FOX, EILEEN LAHEY, MARK R. SHIRLEY, M. SUE STORM, of Healthy Home Alliance, JOSEPH BOHACZ, CANDICE BROWN, GARY BROWN of Families for Appropriate Cellular Tower Siting, SUSAN CLARKE, of Environmental Health Advocacy League, MARY-CROUGHAN MINIHANE, LIBBY KELLEY, SILVIA M. SIEGEL, ANNEGRET C. TOPEL, of Citizens of Marin for Sensible Communications Planning, JERRY DAVIS, JEAN FOLEY, of Ulysses Citizens for Responsible Technology, HOLLY A. FOURNIER, Selectboard Member of Charlotte, VT and co-chair of Citizens for the Appropriate Placement of Telecommunications Facilities, JULIANNA FREE, of Lifeline Resources, Inc., ANNE GALLOWAY, of Hardwick Action Committee, DAVID GELL, RICHARD GIANATTIASIO, of Northboro Residents for Responsible Tower Siting, DALE A. NEWTON, JANET R. NEWTON,

PARTIES TO THE PROCEEDING – Continued

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companies nor non-wholly owned subsidiaries to be listed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Cellular Phone Taskforce respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in these consolidated cases (Nos. 97-4328(L), 98-4003(Con), 98-4005(Con), 98-4025(Con), 98-4122(Con)).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 205 F.3d 82 (2d Cir. 2000) and appears in the appendix of petitioners Citizens for the Appropriate Placement of Telecommunications Facilities, et al., hereafter cited simply as "App.," but appearing therewith, at A-1-22. The unpublished opinion denying Cellular Phone Taskforce's petition for rehearing, electronically reported at 2000 WL 862305, appears at App. A-23-25. An order denying a second petition for rehearing by Communications Workers of America appears at App. A-26.

The two orders of the Federal Communications Commission disposing of its rulemaking, reported at 11 FCC rcd 15123 (1996) and 12 FCC rcd 13494 (1997), have been lodged with the Clerk of this Court because of their significant length.

The letters from Richard M. Smith of the FCC, purporting to respond to and dispose of the appeal regarding petitioner's Rehabilitation Act complaint, dated July 14, 1997 and Feburary 2, 1998, appear at App. A-43-44 and App. A-49-52.

JURISDICTION

The Court of Appeals entered its Opinion on February 18, 2000; its first order denying a petition for rehearing on June 6, 2000; and its second order denying a petition for rehearing on June 15, 2000. Pursuant to Supreme Court Rule 13, this Petition is filed within 90 days of that order. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are included in the aforementioned appendix filed with the petition of petitioners Citizens for the Appropriate Placement of Telecommunications Facilities, et al.

STATEMENT OF THE CASE

A. Factual and Procedural Background

The Cellular Phone Taskforce consists of individuals concerned about the radiation emitted from cellular telephone (and similar Radio Frequency – "RF") transmitting facilities. Many are electrically sensitive, meaning hypersensitive to non-ionizing (*i.e.*, non-nuclear) radiation. They are trapped, like Alice, in a Wonderland in which they feel everyday non-thermal effects of the RF emissions – some to the extent of having been driven literally from their city homes to rural locations lacking such emissions – and yet in which the non-health-related regulatory agency to which their health has been entrusted

ignored the evidence of their travails, failed to present that evidence to its sister agencies which are concerned with health and safety, and had Congress and the FCC preempt their local governments from decisions which might protect their health. Instead, they had to sit by and watch while the FCC relied on an industry-dominated organization's finding that there was "no reliable scientific data" connecting non-thermal exposure to radio frequency transmissions and human health. App. A-9.

Although petitioner does not agree in every particular with the background facts described by the Court of Appeals, and reserves the right to challenge that court's findings should this petition be granted, petitioner commends to the Court, for the purposes of this petition, the factual background set forth both in the lower court's opinion, App. A-3-5, and in the Petition of the Citizens for the Appropriate Placement, etc. Accordingly, the discussion here will endeavor to be brief.

In 1993, the FCC sought to update its 1985 guidelines for RF radiation from its licensees' transmitting facilities, and issued proposed new guidelines for notice and comment. *See* Notice of Proposed Rule Making: In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 FCC rcd 2849, 1993 WL 757412 (1993), cited in Court of Appeals' opinion at App. A-4. After receiving "submissions," App. A-4, from health-related sister agencies, including the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the Occupational Safety and Health Administration ("OSHA") and the National Institute for Occupational Safety and Health ("NIOSH"), the

FCC adopted standards which combined standards recommended by two industry-dominated groups, the American National Standards Institute ("ANSI") and the National Council on Radiation Protection and Measurements ("NCRP"). One aspect of this rule-setting round is most important for this petition: There is no evidence on the record, nor has the FCC ever affirmatively asserted, that it ever specifically sought review by the health-related agencies of the comments submitted to it during the first rulemaking round regarding RF effects upon the electrically sensitive and others.

Meanwhile, Congress, anxious to encourage nationwide access to cellular and other new communications devices, passed the Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 ("TCA"). The TCA instructed the FCC to finish its rulemaking regarding the siting of and permissible emission levels of cell-phone and other wireless service transmission facilities. It also included three provisions which are the subject of constitutional objections raised below and in this petition. It ordered local governments to act on any request for authorization to place transmitting facilities within a "reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), App. A-29; it forbade local governments from taking any action which had the effect of prohibiting the provision of personal wireless services, 47 U.S.C. § 332(c)(7)(B)(i)(II), App. A-29; and it preempted state and local governments from regulating the placement of such facilities on the basis of the environmental effects of RF radiation as long as it was within FCC guidelines. *See* 47 U.S.C. § 332(c)(7)(B)(iv), App. A-30. The FCC issued the guidelines within the mandated time limits. The guidelines

included some of the substantive emissions standards challenged in the court below, and also adopted the TCA's prohibition of state and local governments' denial of siting applications on the basis of environmental concerns, which the order interprets to include health effects. *See* Report and Order ("First Order"), 11 FCC rcd 15123 (1996), lodged with the Court, at 60-61, ¶ 166.

The various petitioners below, among others, sought reconsideration of the First Order, and submitted literally thousands of pages of evidence concerning the non-thermal effects of RF radiation on humans. Again, there is nothing on the record to indicate that the FCC affirmatively sought comment on this evidence from its sister health-related agencies. Indeed, in both the Second Order which resulted from the reconsideration round, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Second Order"), 12 FCC rcd 13494 (1997), lodged with the Court, and in the court below, the FCC simultaneously denied that it had the expertise to evaluate the health-related evidence and yet asserted that such an action was unnecessary because the new evidence submitted during the reconsideration round was not any different than that which had been submitted during the initial round.[1] So a "non-expert" agency

---

[1] During oral argument before the Second Circuit, the following colloquy took place between the appellate panel and the attorney for the FCC:

> JUDGE WALKER: Can you address the other point that was made here about the agency's reconsideration of the other health related agencies' view points and the environmental agencies' view points?

– one with the divided missions both to promote the industry and to safeguard the population – arrogated

---

> MR. MARCUS: I think that the agencies bent over backwards to consider the other health and safety –
>
> JUDGE WALKER: They're [petitioners are] saying on reconsideration that wasn't the case.
>
> MR. MARCUS: Okay. Well, for one thing, the agency had already consulted extensively with EFA [sic], FDA, OSHA, NIAC [sic]. The agency had developed its standards based on the recommendations of two expert scientifically loaded standard-setting bodies.
>
> The agency took under advisement the request that it consult more with the health and safety agencies, and in the Reconsideration Order it said that we decline to do that. I'll find that for you in a minute.
>
> JUDGE NEWMAN: You know that they did. The question is: Having disclaimed their own expertise, why wasn't it arbitrary not to go back to the expert agencies with what is alleged to be substantial added evidence?

Transcript of Oral Argument, April 5, 1999 ("Tr.") at 38-39. After further similar exchanges, the court ended up giving the answer which it adopted in its opinion:

> JUDGE SACK: When it's a question of health impacts, why don't you necessarily go back to the agencies that deal with health impacts?
>
> MR. MARCUS: Well, we did go to the agencies that dealt with health impacts. We went and we discussed it with them extensively.
>
> JUDGE SACK: Not on the reconsideration?
>
> MR. MARCUS: Not on the reconsideration because by that point we had consulted with these agencies extensively.

to itself the right to judge whether evidence regarding health and safety was important enough to submit to the agencies with the expertise to evaluate it. Lewis Carroll could not have imagined a more bizarre (and unfortunate) result.

B. The Rehabilitation Act Claim

In addition to filing a timely appeal of the FCC's rules in the Second Circuit, petitioner also filed a discrimination claim against the FCC under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.* Many of petitioner's members suffer from a medical condition which causes hypersensitivity to electromagnetic, including RF, radiation. Petitioner alleged that the FCC, by conducting a rulemaking without regard to petitioner's members' disabilities, had discriminated against them on the basis of their disability. This claim and a subsequent appeal were summarily denied by the FCC, acting inappropriately through a staff member, claiming that its rules could not be discriminatory because they have no

---

> JUDGE WALKER: Does your argument have to be that the materials submitted on reconsideration were not materially different from the materials that you received in the first instance?
>
> MR. MARCUS: That's what the Commission basically found.

Tr. at 44-45. The flaw here, as noted, is that the Commission did not have the expertise to make the judgment regarding the materiality of the submissions on the reconsideration round any more than it had the expertise to evaluate the substantive importance of that evidence.

"effect" until implemented by the FCC's licensees. Letter of Richard M. Smith, February 2, 1998, App. A-49-52.

C. The Court of Appeals' Opinion

The Court of Appeals had jurisdiction under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) because petitioner petitioned that court to review a final order of the FCC; and additionally, under 29 U.S.C. § 794a(a)(2) and 42 U.S.C. § 2000d-2 with respect to petitioner's discrimination complaint.

The Court of Appeals rejected all of the various petitioners' claims, ruling, *inter alia*, that: (1) the FCC did not, in its First Order, violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, by arbitrarily and capriciously failing to adequately consider the evidence of harmful effects from non-thermal levels of radiation and failing to account for the cumulative effects of radiation in creating categorical exemptions for certain facilities for routine environmental assessment, *see* App. A-7-12, A-15-16; (2) the FCC in its rulemaking did not have to comply with relevant provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, and the rules promulgated thereunder by the Council on Environmental Quality ("CEQ") by failing to complete either an Environmental Impact Statement ("EIS") or an Environmental Assessment ("EA") followed by a finding of no significant impact ("FONSI"), *see* App. A-16-19; (3) the FCC did not err in its interpretation of the Act in such a way as to preempt local governments from zoning regulation of transmission sites on the basis of health and safety, *see* App. A-19-21; and (4) the Tenth

Amendment did not preclude the federal preemption of local authority, *see* App. A-21.

D. The Court of Appeals' Opinion on Reconsideration

On reconsideration, the Court of Appeals reversed its earlier rejection on exhaustion grounds of petitioner's ADA and Rehabilitation Act claims, App. A-6, ruling that petitioner had done all it reasonably could to secure a final agency determination, App. A-24. On the merits, however, the court again rejected the claims. Regarding petitioner's claim that the agency violated Title II of the ADA by forcing state and local governments to discriminate against electrically sensitive people, the court held that the FCC could not itself be made liable under the ADA, *see* App. A-25. Regarding petitioner's Rehabilitation Act claim, the court held that the Guidelines, by allowing proliferation of the damaging towers, did not thereby deny electrically sensitive people the benefits of a "program or activity" of the FCC. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT, CONFLICTING WITH ALL OTHER COURTS WHICH HAVE CONSIDERED THE ISSUE, CREATED A "FUNCTIONAL COMPLIANCE" WAIVER OF THE NEPA REQUIREMENT OF AN EIS OR EA FOR RULEMAKING BY A NON-ENVIRONMENTAL AGENCY

The Court of Appeals recognized that both NEPA and the rules of the CEQ require agencies to prepare an EIS or an EA, followed by a FONSI, for rulemaking such

as that involved here, and that the FCC admittedly did not do so. App. A-16-17. Nevertheless, the court, in an unprecedented broadening of the concept, held that the FCC had engaged in functional compliance. In applying functional compliance to a non-environmental agency, the Second Circuit decision conflicts with every other court that has considered the matter.

Even the case cited by the Court of Appeals makes explicit the limitations on the doctrine. The Court of Appeals justified its application of the functional compliance test by quoting a sentence from the penultimate paragraph of *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973):

> " '[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient.' " App. A-17.

Tellingly, however, the court in this case not only ignored the language at the beginning of the above-quoted sentence – "where an agency is engaged primarily in an examination of environmental questions," which the FCC surely is not – it also ignored the crucial next two sentences:

> "We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that

> the purpose and policies behind NEPA will necessarily be fulfilled." *Environmental Defense Fund v. EPA, supra,* 489 F.2d at 1257.

See also Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 387 (D.C. Cir. 1973) ("we establish a narrow [functional compliance] exemption from NEPA, for EPA determinations. . . . NEPA must be accorded full vitality as to non-environmental agencies. . . . ")

Indeed, petitioner's research has failed to find *any* case in which a non-environmental agency was allowed to avoid an EIS or EA by virtue of functional compliance. To the contrary, even natural resource agencies have been denied functional equivalence and have been required to comply with NEPA, *e.g., Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996) (Fish and Wildlife Service must comply with both NEPA and Endangered Species Act "ESA"); *Texas Committee on Natural Resources v. Bergland,* 573 F.2d 201 (5th Cir. 1978) (Forest Service must comply with NEPA). Up until the Second Circuit's opinion in this case, it appears that every case that has considered granting a non-environmental agency functional compliance status has refused to do so, *e.g., Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n,* 869 F.2d 719 (3rd Cir. 1989); *WATCH v. Harris,* 603 F.2d 310 (2nd Cir. 1979) (H.U.D.).

The importance of this is manifest: If the Second Circuit's expansion of functional compliance is allowed to stand, it both creates a conflict with the cases cited above and, more importantly, creates a loophole in the requirements of NEPA that swallows the rule.

II. THE FCC VIOLATED BOTH NEPA AND THE APA IN REFUSING TO ACTIVELY SEEK HEALTH-AGENCY REVIEW OF THE EVIDENCE CONCERNING THE NON-THERMAL HEALTH EFFECTS OF CELL-PHONE TRANSMITTER RADIATION

Federal agencies are required to consult with agencies that have special expertise with respect to any environmental impact involved. 42 U.S.C. § 4332(C), App. A-32. As noted in the Statement of the Case, *supra*, the FCC admitted that it failed to refer to health-related agencies the voluminous evidence submitted, regarding RF effects on the electrically sensitive and others, in the reconsideration round. As a matter of fact, there is nothing on the record, nothing, that shows that the FCC actively sought health agency review of that evidence at all during rulemaking, except for early "consultation" immediately following issuance of the 1993 notice of proposed rule-making. Indeed, the FCC ignored a statement by NCRP that the "existence of non-thermal effects 'is clouded by a host of conflicting reports and opinions.' " Quoted in Court of Appeals' Opinion, App. at A-9. Similarly, in its Second Order, the FCC claimed that "[i]t would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards than those advocated by federal health and safety agencies." Second Order, lodged with Court, at 12, ¶ 31, quoted by Court of Appeals at App. A-9. In fact, however, in the face of "conflicting reports and opinions" and its own admitted lack of expertise, the FCC declined to submit the host of

evidence submitted on this subject to the health-related agencies. Its failure so to do was arbitrary and capricious under both the APA and NEPA.

A. The Administrative Procedure Act Violations

The APA's guarantee of the right of the public to comment on proposed rules " 'is meaningless unless the agency responds to signficant points raised by the public.' The need for discussion is paramount precisely because evidence was presented in support of, and in opposition to, most of the proposals." *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1217 (D.C. Cir. 1983), quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979). Yet that is what the FCC did here. For example, in ¶ 11 at page 6 of the First Order the FCC admitted that "more than 100 parties, including . . . individuals, submitted comments," yet in ¶¶ 15-27, at pages 7-12 of that order, only comments by industry and agencies are described. In ¶¶ 25-28 of the Second Order, at 10-11, the FCC acknowledges the concerns of several of the petitioners below and the evidence submitted, citing in particular petitioner's claims that the emissions levels ignored those who were electrically sensitive, and that " 'perhaps 2%' " of the population were susceptible to becoming electrically sensitive. Second Order, at 11, ¶ 26. Similarly, Dr. Marjorie Lundquist "suggests" that while the existence of non-thermal effects is controversial, " 'the scientific consensus is swinging in favor of their existence.' " *Ibid.* Moreover, Dr. Lundquist maintained that the 1992 ANSI/IEEE guidelines relied upon by the

FCC were "not consistent with electromagnetic field theory, lack a sound scientific basis and may, therefore, be presumed 'to be inadequately protective of public health.' " *Id.* at ¶ 27. Yet in ¶ 111, at 45, the Second Order states: "There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects." This from an agency that both disclaimed expertise and failed to seek on the reconsideration round expert agency comment on the very evidence it rejects.

In *Action on Smoking and Health v. C.A.B., supra,* the court rejected as arbitrary and capricious the agency's failure to consider the effects of passive smoking on health because "the Board found that '[t]he evidence of a link between "passive smoking" and cancer is . . . slight and controversial.' " *Id.* at 1218. Yet that is precisely what the FCC did here. The Court of Appeals' finding in this case that the FCC's failure to consider or to seek guidance from the expert agencies on the evidence of dangerous RF effects, no matter how slight or controversial it was, was not arbitrary and capricious, is in direct conflict with these aforecited D.C. Circuit rulings.

The Court of Appeals' holding in this case, which approved the FCC's APA errors, was also in conflict with its sister circuit's ruling in *National Ass'n of Broadcasters v. FCC,* 740 F.2d 1190, 1211 (D.C. Cir. 1984), which noted that "an incremental approach to agency decision-making is least justified when small errors in predictive judgments can have catastrophic effects on the public welfare. . . . " Yet in this case, petitioners and many others before the FCC and the Second Circuit fairly screamed

that the transmitter emissions had profound and deleterious effects on their health. For the FCC to have eschewed serious health-agency evaluation of these claims, while simultaneously disclaiming its own expertise, was the very model of arbitrary and capricious agency rulemaking.

B. The NEPA Violations

As noted above, there is no evidence that the FCC specifically submitted to the health-related agencies the comments it received both before and after the First Order raising the issue of non-thermal harmful effects from cell-phone transmitters operating under its proposed and adopted guidelines. As also noted above, there is affirmative evidence, at oral argument and in the Second Order, that the FCC at minimum failed to submit that evidence or discuss it with the relevant agencies on the reconsideration round. This failure is arbitrary and capricious, and contrary to the procedural requirements of NEPA, 42 U.S.C. § 4332(C), App. A-32, and the mandate therein to comply with NEPA "to the fullest extent possible."

> "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures [i.e., an EIS]. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its

> impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation of additional data."

Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980).

In this case, the Court of Appeals' finding that both the FCC's First and Second Orders functionally satisfied NEPA requirements is contradicted by the FCC's failure to consult with the expert agencies in any meaningful way after 1993 and in particular on the reconsideration round, especially in light of the FCC's admitted lack of expertise to perform the reasoned evaluation under the factors as set forth in *Warm Springs, supra*.[2]

NEPA also requires an agency to evaluate the cumulative impacts of a project. 40 CFR § 1508.27(b)(7).[3]

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[2] There are situations which justify a court's utmost deference to agency determinations. Such situations arise in cases which address agencies dealing with issues within their areas of expertise at the frontiers of science, *e.g., Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 104, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). Such deference is unwarranted where the issue is outside the scope of the agency's expertise.

[3] 40 CFR § 1508.27 defines "significantly" for purposes of NEPA, and provides, in relavant part:

> "*Significantly* as used in NEPA requires considerations of both context and intensity:
>
> . . . (b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

When there is scientific uncertainty regarding significant adverse impacts, the agency must either obtain the information to resolve the uncertainty or evaluate that uncertainty using a worst case analysis. 40 CFR § 1502.22.[4] The FCC's failure to reconsult with the expert

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> . . . (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."

[4] 40 CFR § 1502.22, concerning incomplete or unavailable information, provides in relevant part:

> "(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. *For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is*

agencies despite its own lack of expertise highlights the arbitrary and capricious aspect of its decision and casts additional doubts on the validity of the required cumulative impacts analysis and worst-case analysis.

III. THE TELECOMMUNICATIONS ACT, § 704(b), CONSTITUTES AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY TO THE FCC BECAUSE THE TCA LACKS AN INTELLIGIBLE PRINCIPLE TO WHICH THE AGENCY IS DIRECTED TO CONFORM

> "The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta v. United States*, 488 U.S. 361, 371-372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928).

The TCA is a "forbidden delegation of legislative power" because it lacks "an intelligible principle." *Ibid.*

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low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." (Emphasis added.)

This improper delegation is in violation of Article 1, Sec. 1, and Article 1, Sec. 8, para. 18 of the Constitution, App. A-28, as interpreted by this Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

The delegation in the TCA simply states:

> "Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." § 704(b), App. A-31

This Court has on occasion approved delegations of power which have been less than models of clarity. In *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 91 L.Ed. 103, 67 S.Ct. 133 (1946), this Court explained that certain seemingly vague delegations "derive much meaningful context from the purpose of the Act, its factual background and the statutory context in which they appear." Similarly, in *Lichter v. United States*, 334 U.S. 742, 783, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948), this Court upheld delegation of authority in light of pre-existing administrative practice.[5]

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[5] Neither of the two cases relied on by the FCC in its brief below are on point. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 84 L.Ed. 656 (1940) support the broad delegation of authority to the FCC (under The Communications Act of 1934) to issue or revoke licenses that would serve the "public interest, convenience, or necessity." The Congressional concern behind the 1934 legislation was expressly to avoid, in the absence of governmental control, monopolistic domination in the

In this case, there is no such saving principle, and Congress failed to provide even a hint of a standard by which the FCC was to formulate its rules. Nor does the legislative history of the TCA provide any assistance. There was no floor debate which clarifies what standards or principles the FCC should use. Neither was guidance provided to the FCC as to how to balance its new responsibility in health and environment with its other mandates which might conflict – mandates to promote advanced technologies and universal service.[6]

The D.C. Circuit has recently ruled that Sections 108 and 109 of the Clean Air Act, as construed by the EPA, effect "an unconstitutional delegation of legislative power" because the agency had "articulated no intelligible principle" in promulgating air quality standards. *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1033

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broadcasting field. *Pottsville Broadcasting Co., supra* at 137. The broad delegation of authority that was upheld in these two cases has no bearing on the impermissibility of the scope of authority in the TCA, which had the effect not of protecting the public from industry monopoly but of a broad delegation to promote an industry without the hindrance of protective public health standards or the regulatory rights of the states. The delegation in these cases was also within the FCC's area of expertise and administrative practice.

[6] These mandates are found in several laws. "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). "Access to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). And in 47 U.S.C. § 309(j)(3)(D), concerning competitive bidding for licenses or permits, the FCC is directed to promote objectives which include "efficient and intensive use of the electromagnetic spectrum."

(D.C. Cir. 1999), *cert. granted*, ___U.S.___, 120 S.Ct. 3129, 147 L.Ed.2d 231 (2000). The D.C. Circuit found that "the standards in question affect the whole economy, requiring a 'more precise delegation than would otherwise be the case.' " *Id.* at 1037, quoting *Schechter Poultry, supra*, at 553. It is noteworthy that this invalidated delegation fell within the implementing agency's area of expertise, yet the Second Circuit in this case validated Section 704's bare-bones delegation which required guidelines at least partially outside the FCC's area of expertise. *See* App. A-21 (rejecting petitioners' remaining constitutional claims as without merit).

This case is reminiscent of *Schechter Poultry, supra*, where Congress gave sweeping power over the nation to "codes of fair competition" supplied to the President by trade or industry associations. 295 U.S. at 529. Such a delegation, the Court held, was "unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537. In the instant case, Congress, without other instruction, told the FCC to complete a rulemaking in which that agency had already proposed to adopt either the 1992 ANSI standard or that of another private organization, the NCRP. First Order, at 5, ¶ 10, and 6, ¶ 12. The rulemaking was originally designed merely to comply with NEPA, as to when the FCC's licensees would have to prepare an EA. First Order, at 3-4, ¶ 6. But § 704(a) of the TCA gave these rules new sweeping power over the nation:

> "No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv), App. A-30.

The standardless delegation approved by the Court of Appeals in this case is all the more constitutionally suspect for its granting to a non-health-related agency powers to regulate in an area so directly related to health. Seldom has a Congressional grant of legislative authority to an executive agency been so sweeping, so brief, and so out of context with the agency's other enabling legislation. The guidance of this Court is needed as to whether a delegation of power to an executive agency in a field so far removed from the agency's expertise, without any other guidance, which has both economic and environmental impacts on every single municipality in the United States, satisfies the nondelegation test articulated in *Mistretta, supra*, or whether, " 'If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject.' " *Hampton Jr. & Co., supra*, 276 U.S. at 406, quoting *State ex rel. Railroad & Warehouse Comm'n v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, 301, 37 N.W. 782 (1888).

IV. THE SECOND CIRCUIT'S REJECTION OF PETITIONER'S CLAIM UNDER THE REHABILITATION ACT CONFLICTS WITH OTHER CIRCUITS' DEFINITIONS OF 'PROGRAM OR ACTIVITY' AS INCLUDING ZONING

In its opinion on rehearing, the Court of Appeals rejected petitioner's complaint under the Rehabilitation Act ("RA"), 29 U.S.C. § 701, *et seq.*, on the grounds that the RA did not apply because electrically sensitive people were not being excluded under the FCC's First or Second Orders from a "program or activity" of the FCC. *See* App. A-25. In doing so, the Court of Appeals ignored and conflicted with ample authority from other circuits (and within its own) that zoning decisions constitute a "program or activity."[7]

In *Bay Area Addiction Research v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999), the Ninth Circuit held that zoning constitutes a program or activity under the Rehabilitation Act. The court went on to state "The Rehabilitation Act and the ADA apply to zoning because zoning 'is a normal function of a governmental entity.' (Citations omitted.)" *Ibid.* In *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 49 (2nd Cir. 1997), the Second Circuit held that a claim was cognizable under the Rehabilitation Act based on the appellees having been denied the benefit of a zoning decision without regard to the

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[7] It should be noted that the Court of Appeals' decision on rehearing did not address the issues of whether electrically sensitive persons are "otherwise qualified individual[s] with handicaps" under 29 U.S.C. § 794(a), App. A-33. Accordingly, for purposes of this petition, that issue is not before this Court.

disabilities of the IHS's clients. Thus, to the extent that the TCA and the Second Order preclude zoning decisions on the very issues that affect the electrically sensitive, they constitute zoning decisions which are, therefore, subject to the Act. Indeed, in drafting its own rules to implement the RA, the FCC itself also clarified that "the Commission must comply with these non-discrimination requirements when establishing safety standards for the operations of licensees." Report and Order, 2 FCC rcd Vol. 8 at 2203, App. A-38.

The Court of Appeals' holding that the RA did not apply in this case also had the effect of rejecting petitioner's claims that the FCC's treatment of petitioner's RA complaint amounted to wholesale violations of its own rules and the rules promulgated under the RA. The FCC is required to accept and investigate all complaints within its jurisdiction. 47 CFR § 1.1870(d)(1), App. A-36. The decision regarding the investigation of the complaint must include findings of facts and conclusions of law and a notice of the right to appeal. 47 CFR § 1.1870(g), App. A-37. An appeal will not be heard by the person who made the initial determination on the complaint, 47 CFR § 1.1870(i), *ibid.*; Report and Order, *supra*, at 2208, App. A-39. An appeal will be decided within 60 days. 47 CFR § 1.1870(j), App. A-37. In this case, the FCC failed to investigate petitioner's complaint; failed to include findings of facts, conclusions of law and a notice of the right to appeal the FCC's response to the complaint; failed to have a different person handle the appeal; and delayed 116 days in responding to the appeal which was wrongfully denied. *See* Complaint filed on February 3, 1997, App. A-40-42; Letter response by Richard M. Smith, dated

July 14, 1997, App. A-43-44; the Appeal filed on October 8, 1998, App. A-45-48; and the FCC's letter response by Richard M. Smith dated February 2, 1998, App. A-49-52. Simply put, the Court of Appeals' decision precluding application of the RA to the rulemaking at issue here had the effect of gutting both the RA and the regulations promulgated to enforce it.

V. THE QUESTIONS PRESENTED ARE IMPORTANT

As suggested by the fact that at least three, and perhaps more, separate petitions for certiorari will be filed in this case, its impacts are as broad as the Court of Appeals' findings were in error. At the level of administrative jurisprudence, the lower court's opinion conflicts with numerous cases of its own, its sister circuits, and this Court, on constitutional, statutory, and regulatory issues. This case raises issues, some of them covered in our co-petitioner's petitions, concerning the Tenth Amendment, NEPA, the Rehabilitation Act, the APA, and congressional delegation of power. It is hard to imagine a case more bristling with issues for this Court's resolution and guidance.

The legal discussions, however, too easily mask the underlying human dimension of this tragic exercise in technological advancement. The Court of Appeals' decision sanctioned Congress's and the FCC's preemption of local control over, and ignored real evidence concerning, the actual dilatory health effects of widespread cellular phone transmission on a portion of the population who have been impacted beyond repair. The electrically sensitive have been by these rulings cast out both from their

homes and from the halls of their government's decision-making. This result should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-0407, 00-0417, 00-0427

IN THE

SUPREME COURT OF THE UNITED STATES

David Fichtenberg,
Micahael C. Worsham,
Cellular Phone Taskforce,

vs.

Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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85pp

QUESTIONS PRESENTED

1. Whether comment on a matter that would lawfully require consideration when the lead agency in a rule making has expertise in the matter also requires such consideration when the lead agency does not have such expertise?

2. Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

3. Whether lead agencies not expert in a health or environment matter may follow procedures 'functionally equivalent' to the National Environmental Policy Act (NEPA) and so avoid their formal NEPA requirements, and whether FCC did so?

4. Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption and sec. 253(b) provides for States protecting public safety?

6. Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

LIST OF PARTIES

List of Parties in proceeding below is given in the List of Parties section in each of the petitions 00-0393, 00-0407, 00-417, and 00-427.

Parties supported by this brief in support are David Fichtenberg (#00-0407), Michael C. Worsham (#00-0417), and Cellular Phone Taskforce ("CPT") (#00-0427).

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Opinions Below

In addition to reports in petitions supported, note that the Federal Communications Commission ("FCC") First Order in Notice 96-326 reported at 11 F.C.C. Rcd, 15123 (1996) established a 'transition' period. During this time previous FCC RF guidelines for station applications continued in effect [sec. 47 CFR 1.130(b)(4)]. 47 CFR 1.1307(b)(4)(i) continues in effect for certain services "Radio Frequency Protection Guides" recommended in the "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982). For other services 47 CFR 1.1307 (b)(4)(ii) continues the RF guideline "IEEE C95.1-1991 (ANSI C95.1-1992) Safety Levels With Respect to Human Exposure To Radio Frequency Electromagnetic Fields 3 kHz to 300 GHz." These were lodged with the Court with petition #00-0407.

Jurisdiction

This brief is in support of certain petitions for writ of certiorari and is being filed pursuant to Rule 12.6 and Rule 24.2. It regards request of the judgment of the U.S. Court of Appeals for the Second Circuit in consolidated cases 97-4328 (L), 98-4003(Con.), 98-4005(Con.), and 98-4122(Con.). The original opinion is reported as *Cellular Phone Taskforce et al. v. FCC*, 205 F.3d 82 (2d Cir. 2000). The petitions supported are the petitions for certiorari of David Fichtenberg (Docket #00-0407), Michael C. Worsham (Docket # 00-0417) both docketed September 15, 2000, and in support of CPT (Docket #00-0427) docketed September 20, 2000. This brief is being filed on October 5, 2000 which is within the 20 day period

for filing provided by Rule 12.6.

This brief does not address support for the petition of Citizens For Appropriate Placement for Telecommunications Facilities et al. ("Citizens"), docket #00-0393, docketed September 13, 2000, because the date for formally expressing such support has past. I am an individually named party in the above named Court of Appeals case, with my name appearing on page 6 of the Court of Appeals docket report, and shall limit comments to additional points not in petitions already filed with the Court.

Certain affidavits, including those presented or referenced in the proceeding below are discussed further in Statement of the Case. Parties submitting these affidavits indicate how they are adversely affected by the challenged rulemaking. A favorable ruling by this Court would provide them significant relief.

Hearing Examiner documents at p.62-68 pertain to Mr. Fichtenberg's role as spokesperson for organizations in Seattle, Washington. 1996-present [see his petition at 11-15.]. Mr. Fichtenberg is President of Ad-Hoc Association of Parties Concerned About the FCC RF Health and Safety Rules (AHA), a party in the proceeding below. Its standing is discussed at p2-7 in the principal brief joined by all petitioners below, except CPT [see J.Hobson letter at 60]. Harms to AHA's mission impact Mr. Fichtenberg whose duties are to further it.

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions already noted in the Petitions, 42 USC 1983 [p. 37], 47 USC 332(a) [p. 44] and (c)(3)(A) are relevant. [p. 44]

Statement of the Case

Reference to pages of the Joint Appendix in the proceeding below are designated by "JA". Reference to the briefs joined by all petitioners, except CPT, are designated as "Joint Petitioners or "JP".

Affidavits submitted and lodged with the Court:

A. During the proceedings below affidavits of the following parties in the Citizens petition were submitted or referenced (page nos. are of pages in copies of affidavits lodged with the Court:

CPT members Frank Goodrich of Texas (21), Marija Hughes of Washington D.C. (39) in exhibit of April 19, 1998 CPT motion for partial stay. Janet Newton (4), Dale Newton (5) Roger Knolton (6) and Lorinda Knolton (7) of Vermont, in April 29, 1998 Comments supporting motion for partial stay

B. Sixteen additional affidavits indicating they are members of CPT were submitted in a CPT April 19, 1998 motion for partial stay and include persons from the following States: Vivian Ferguson (18) and Eldfrid Bowron (20) of Washington; Muriel Anrow (28), Martha Winsten (30), Arthur Firstenberg (11), June Reiber (66) and Janet Ostrowski (90A) of New York; Charles Mainville (32) of Maine; Hal Rudnianin (34) and Alison Rall (37) of Michigan; Derek Bishop (35) of Hawaii; Alice Beougher (41) of Ohio; Lucinda Grant (54) and Susan Malloy (87) of Arizona; and Regina Siberski (68) and Kathleen P. Hawk (73) of Pennsylvania.

These show harms for which relief will be provided by a favorable ruling. See examples at p.57-8. The symp-

toms in many of these affidavits are similar to those EPA described (and was reported in the proceeding below.) EPA noted that complaints of symptoms attributed to RF exposure such as nausea, headaches, dizziness, pain in the eyes, ringing of ears, screeching and sizzling sounds, and irregular heartbeat are described collectively by the term "electrosensitivity." [JA 5538-39], JP Reply at 39. Also filed is affidavit of Michael C. Worsham, regarding its mention in JP principal brief of May 22,1998, and affidavit of D. Fichtenberg regarding its mention in JP Reply brief of July 27, 1998. His supplementary affidavit that I requested is at p.58.

Statement of case regarding Question #2:

Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

Keeping exposure as low as reasonably achievable is referenced in a petition for reconsideration to FCC of Ad-Hoc Association and other parties in the Joint Appendix ("JA") of the proceeding below at JA 0892 and in ex parte comments at JA 1359-62, at JP brief at 31. 47 USC 324 requires that radio stations shall use the minimum amount of power necessary to carry out the communications desired. (see text at David Fichtenberg (DF) petition at 21, and JP brief at 33.)

Judicial history:

1926 Attorney General Opinion:

The Attorney General issued an opinion regarding Regulation 14 of former Sec. 54 of Title 47, "the Secretary of

Commerce was not given power to determine in advance what this minimum amount should be for every case, and therefore he had no authority to insert such a determination as a part of any license." [1926, 35 Op.Atty.Gen. 126]

The Harvit et al. case:

The case of *Harvit Broadcasting Corp.* et al. is reported in Notice FCC 75R-344 reported in FCC Reports, 55 F.C.C. 2d 298, adopted August 21, 1975, Released September 17, 1975. In *Harvit* the Administrative Law Judge William Jensen concluded that applications by two broadcast companies should be denied, per 47 USC 324, in part because they were using excessive power for their coverage area. FCC overturned Judge Jensen's decision. FCC reversed the decision and reported,

"We agree with the Broadcast Bureau that the minimum power requirement of Section 324 was taken into consideration by the Commission at the time it established its Table of FM Channel. Assignments pursuant to Sections 303 and 307(b) and that these assignments [section references omitted] were designed to insure the fair, efficient, and equitable distribution of radio service among the several States and communities. To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [*Harvit* Id. 300]

FCC previous rules included keeping RF exposure as low as reasonably achievable

Joint Petitioners [JP Reply at 14] noted the relevant section of the previous FCC RF standard which states,

"Because of the limitations of the biological effects data base, these guides are offered as upper limits of exposure, particularly for the population at large. Where exposure conditions are not precisely known

> or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [ANSI C95.1-1982, Section 5. Explanation, page 11. Document lodged with the Court by petitioner D. Fichtenberg, Docket 00-0407].

The Second Circuit Opinion notes that the previous FCC RF guidelines were those of ANSI C95.1-1982. [A11-A12].

FCC issued its OST bulletin No. 65, to explain to its licensees how they can comply with the FCC adopted ANSI RF standards. It was released in October 1985. In its section "ANSI Protection Guides for Exposure to RF Radiation" describing the ANSI 1982 requirements, FCC explicitly notes the above paragraph and states,

"Because of 'limitations in the biological effects data base," ANSI stated that 'these guides are offered as upper limits of exposure, particularly for the population at large.' ANSI further advised that, '[w]here exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [see OST Bulletin No. 65, p. 5-6, lodged with the Court with D.Fichtenberg Petition #00-0407].

Statement of case regarding Question #4:

Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the factual comments in the filed petitions pertaining to this question, there are addition facts that

pertain to the RF expertise of the federal health agencies during the time period of the FCC rule making. These facts indicate that even the 'expert' agencies did not have the knowledge to advise what RF limits should be for conditions of chronic exposure to RF.

In 1993 FDA wrote the FCC with regard to its proposed RF standard, IEEE C95.1-1991 (ANSI C95.1-1992). FDA said,

"With respect to the specific levels cited in the standard for Maximum Permissible Exposures and SARs. CDRH has in the past expressed concern about the 1992 guidelines. The standard, as written, lacks a full explanation of its basis. In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by the standard. For example, very few research studies of long-term, low-level exposures of animals were included in the standard, despite the existence of studies that suggest an association of cancer development. Other studies have been published since finalization of the standard that strengthen this concern.

In addition, there have been insufficient studies of the health of humans who have been exposed to RF for several years or more. Although the current state of scientific knowledge does not enable us to offer a specific alternative to the exposure levels in the new standard, we do not believe this standard addresses the issue of long-term, chronic exposures to RF fields. (emphasis added).

[Letter of November 10, 1993, from Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health (CDRH) to Mr. Thomas P. Stanley of FCC. Letter in Joint Appendix of proceeding below at JA 0450-0451].

Similarly, in its 1996 letter to FCC, FDA reminded the FCC of its 1993 comments and stated,

"We also stated that we did not believe that C95.1-

> 1992 addresses the issue of long-term, chronic exposures to RF fields, and that the relevance of such questions would only increase as the use of portable and hand-held devices grows." [July 17, 1996 letter of E.D. Jacobson to FCC, at Second Circuit Joint Appendix 0616.]

Likewise, at a March 21, 1995 meeting with FCC, EPA outlined its plans for issuing RF guidelines. There it indicated that its first guidelines would be "Interim" and would "not include modulation, chronic exposure, nonthermal effects," [JA 0564, JA 0567] and that this would be addressed in a subsequent 'phase 2' EPA "final" exposure guideline. [JA 0566].

Consistent with the above, the Court of Appeals noted,

> "the parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the [FCC] Guidelines are premised on such effects." [A8]

Thus, the federal health agencies did not view the FCC RF guidelines as addressing the chronic exposure situation.

Facts on how FCC exercised its delegated authority relative to advice from federal health agencies on 2 key questions:

- **(a) What should be the RF exposure limits in public thoroughfares (sidewalks, parks, bus stops, etc.)?**

- **(b) When should cellular phone and other manufacturers of hand-held wireless phones be able to avoid evaluating if their products exceed safety limits?**

Whether FCC properly exercised its delegated authority may arguably be considered by considering facts on the extent FCC deferred to advice from the federal health agencies on the 2 key questions above. In its Brief FCC informed the

Second Circuit "shortly before the RF Order was issued, the FCC contacted each of the agencies, outlined the planned response to their comments, and solicited further input."[FCC Brief at 18] and then gave details [FCC Br. 18]. A close examination shows that the "planned response" was significantly changed when the final order was issued. Here are the specifics.

On July 1, 1996, FCC Chairman Reed Hunt sent a communication to EPA describing its proposed rules [see p.69 and JA 0614]. On July 2, 1996 Mr. Richard Smith, Chief of FCC Office of Engineering and Technology sent a similar letter to FDA [see p.72 and JA 616]. In both of these communications FCC staff indicated they proposed an approach that generally incorporated elements from both ANSI/IEEE and NCRP, and included:

1) "adoption of limits for field strength and power density limits based on *NCRP recommendations;"*

* * *

3) "deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible *future* consideration of a modified version.;"
[This means that FCC says it will defer adopting a provision that would allow manufacturers of certain 'low power' cellular phones or other devices to exclude themselves from having to evaluate if a particular product design could result in exceeding the FCC RF safety limits.] [emphasis added]

Subsequently, Arthur Firstenberg, who is President of petitioner Cellular Phone Taskforce, noticed that the actual text of the draft proposal to which FCC referred in its above

letters to EPA and FDA and to which the federal health agencies responded did not appear in the public record. Under a Freedom of Information Act (FOIA) request, he asked FCC for a copy of this draft proposal and FCC refused this request [see CPT Reply brief at 25-26, and its addendum B40-44 for A.Firstenberg's FOIA request and B45-47 for FCC's reason for refusal. Also see FCC refusal letter herein at p.80-83, especially see underlined text at p.83.]

In FCC's discussion of its refusal to release the document to which the federal health agencies responded, FCC said,

"The Report & Order [First Order] that was eventually adopted may differ in some respects from the document in question because it incorporates comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC [Interdepartment Radiation Advisory Committee] consultative process." [CPT Reply, addendum B-47, and herein at p.83]

What FCC First Order (Report & Order) actually provided regarding 1) and 3) above:

Facts regarding adoption of NCRP limits for field strength and power density [point 1)]:

When FCC released its First Order [notice FCC96-326] on August 1, 1996, it stated, "Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3. [footnote 1 to par.#1, First Order p. 1, JA 0629 and at p.84]

NCRP RF radiation limits for field strength and power density limits in NCRP 17.4.3 provide that the more restric-

tive general population exposure limits are also to apply to public thoroughfares [through which the public passes in transit] and is to be based upon a persons average exposure over a 30 minute period. Specifically, this section notes:

> "At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM [radiofrequency electromagnetic] sources, and brief exposure to civil telecommunications." [see 17.4.3 at p.79 and JA 0307] [emphasis added]

In its First Order, FCC ruled regarding RF exposure limit guidelines in public thoroughfares:

> "Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits [which are 1/5th of occupational/controlled limits], as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means." [par. #43 Notice FCC 96-326, at p. 75 and JA 0644].

The above policy ruling was also incorporated into Note 1 to Table 1 of 47 CFR 1.1310 (at p.75 and JA 0721)]

Facts about FCC's First Order regarding FCC deferring adoption of provisions allowing manufacturers to not evaluate if their cellular phone designs result in RF exposure exceeding safety limits [point 3)]

FCC reported that FDA indicated that an appropriate radiated power exclusion level for ensuring that the limit for the public of RF exposure to the head under 'worst case' conditions would be on the order of 180 mW at 900 MHz., where 'mW' is milliwatts of power - a milliwatt is 1/1000th of a

watt. [par. 71, FCC 96-326 (at p.75 and JA0655)].

This means that FDA said that if the amount of output power of a cellular or other hand-held phone is more than about 180 milliwatts of power, then under 'worst case' conditions there is a risk that the head of a user would absorb RF amounts above the safety limits.

FCC said it studied RF exposure from six cellular phone models operating near 900 MHz based on a "standard" operating situation for the position of the phone relative to the head. Based on such study, FCC established for such cellular phones a radiated power exclusion clause that permits manufacturers of cellular phones with less than 570 mW of output power from having to evaluate if their product may result in RF exposure that exceeds safety limits. [see par. 72, 73 FCC 96-326, [at p.76-77 and JA 0655-56].

Reasons For Granting the Petition

Summary of Argument

Pertaining to Question #2:

FCC interpretation of 47 USC 324 is that it requires FCC to establish maximum limits on power, taking 47 USC

324 into account. But this is the opposite of what Congress intended. 47 USC 324's plain sense is that within the maximum power limits FCC may set, each station, on a case by case basis, needs to take steps so that only minimum power necessary is used.

Pertaining to Question #4:

FCC and the federal health agencies acknowledged that they do not have expert knowledge on RF health effects due to chronic exposure, but admit there is evidence of adverse effects - and so could not properly consider this important factor. Hence, there is no proper authority to preempt.

Pertaining to Question #5:

Additional points not in other petitions on why FCC cannot preempt RF regulations to protect health:

- 47 U.S.C. 332(c)(3)(A) supports local regulation
- History of preemption section shows that Senate did not agree with House. Language changes all support that the Senate would not agree to preempt local health regulations.
- The syntax of the preemption, by specifying the condition that local RF regulation must be on the basis of 'environmental effects' implies there are other conditions (health) when preemption is not allowed.

Pertaining to Question #6:

If a local jurisdiction or State abandons regulation of zoning and permitting cellular phone and other personal wireless services facilities, then it would not be immune from likely tort liability suits – since there is no reasonable cause for such abandonment. This risk to liability distinguishes the FCC RF exposure preemption from other seemingly similar preemption cases. The result is the 'choice' between being forced to risk liability or to run the federal FCC RF exposure

program. This is (de facto) commandeering as described in New York v. United States, 505 U.S. 144 (1992)

Argument

Question #2: Whether the Federal Communications Commission ("FCC") lawfully declined to continue its previous requirement that microwave/radio frequency (RF) radiation exposure from its facilities be as low as reasonably achievable and considering 47 USC 324 requirement that radio stations use minimum power necessary for the desired communications?

In formulating 47 USC 324 Congress clearly is not seeking an energy conservation program per se. Rather Congress is trying to minimize any known or suspected adverse effects of radio frequency radiation - which at the time the statute was established was radio frequency interference.

Recall that in *Harvit,* FCC states its maximum power limits 'satisfy' 47 USC 324. FCC claims that,

> "To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [Harvit Id. 300]

This makes no sense. FCC sets maximum power limits based on wanting to prevent interference between its licensees and, according to FCC, it also considers the maximum power its licensees may need to cover their desired broadcast area. If we interpret 47 USC 324 literally, as did the opinion

at 1926, 35 Op.Atty.Gen. 126, then this statue simply says that in addition to staying within the maximum power output limits set by FCC, each station must examine its particular circumstances to strive to use minimum power.

This interpretation does not render FCC tables of maximum allowed power a violation of 47 USC 324 as FCC claims. On the contrary, it means what FCC intended to emphasize to its licensees in its OST Bulletin No. 65, page 5-6 (see p.12). Namely, that even though maximum FCC power limits are not exceeded, still licensees are to take steps to minimize the RF power to which populations may be exposed in order for licensees to reach their broadcast areas.

A purpose of the Telecommunications Act of 1996 was to secure "higher quality services for American consumers." Minimizing the RF power to which cellular phone users and the public are exposed as provided in the FCC's previous RF guidelines is one important aspect of providing such services.

Thus, there appear two ways that 47 USC 324 is interpreted. FCC says that the statute's "minimum power" requirement is met as long as FCC's "maximum power" limits are met. With due respect, it is suggested that this FCC interpretation is far from the plain meaning and in no way can be interpreted as what Congress intended. 'Maximum allowed power' is just not the same as 'minimum power necessary' without exceeding maximum limits. Minimum power needed must be determined on a case by case basis, and cannot be set in advance, as can FCC maximum limits.

When Congress told FCC to finish its rule making in ET-Docket 93-63 [Telecom. Act of 1996, sec. 704(c)] it did not authorize FCC to exceed its authority and violate federal stat-

ute, such as 47 USC 324. Therefore, whatever RF guidelines FCC might propose, they cannot conflict with 47 USC 324 as understood according to the U.S. Attorney General view at 1926, 35 Op.Atty.Gen. 126, at p.10-11]

.

Also, as noted above, FCC did not give any documentation or specifics about its methods or results when it stated seeking a "proper balance" between the needs of public health and efficient telecommunications services was the reason it did not adopt the "as low as reasonably achievable" policy (reversing its previous policy in ANSI 1982, noted above) – and such reversal appearing in conflict with the policy of Congress as given in 47 U.S.C. 324 described above.

This court has ruled, "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicles Manufacturers Assn. v. State Farm Mutual, 463 U.S.* 29,42].

Whether the understanding of the FCC or the view of the Attorney General above is followed in the build-up of the wireless technology revolution can have a great impact. This can effect how this build-up occurs, what types of base station transmission facilities are developed, what types of cellular phones are designed, and how extensively the population is exposed to RF beyond what is as low as reasonably achievable.

For this reason it is very important for the Court to decide to consider hearing Question #2 above and deciding what 47 USC 324 requires.

Question #4: Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter or when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the comments already submitted on the above question, consider the following. The CPT petition, #00-0427, notes that the case J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394 was recently referenced in Mistretta v. United States, 488 U.S. 361, 371-372. In Hampton, Jr. and Co. is noted regarding preemption authority that,

"If such a power is to be exercised at all, it can be only satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." Hampton Jr. and Co. 276 U.S. at 406 quoting State ex rel. Railroad and Warehouse Comm'n v. Chicago, M. and St. P. R. Co., 38 Minn. 281, 301, 37 N.W. 782 (1888).

Also, this Court ruled,

> "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' [In *Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)]

Pertaining to this standard of review, note that from the Statement of the Case for this question it is clear both EPA

and FDA acknowledge that: (1) evidence of adverse health exists below the hazard threshold upon which the FCC standard is based, (2) the FCC standard does not address the issue of chronic exposure, and (3) that these agencies do not have sufficient information to advise on what specific maximum limits should be to protect from chronic RF exposure.

Thus, based on *Motor Vehicles* above, to preempt in an area means there is sufficient knowledge about the subject to know how to decide, so important factors can be properly considered. So it seems that the only 'regulation' FCC can properly adopt when needed information is lacking to rule that local jurisdictions may set their own criteria as long as it is based upon bona fide scientific studies and public health considerations.

FCC may not argue it rules rely on the delegated authority of the federal health agencies – for there is no rational connection between FCC assertions its rules have the support of the federal health agencies and the facts in the record.

FCC justified its rules claiming these rules had the support of the federal health agencies. As noted at p.13-14, whatever support these agencies did give, they emphasized that the new FCC rules did not rely on knowledge of the long-term chronic exposure health effects of RF radiation. (see discussion above).

Moreover, it was noted at p.14-18 that perhaps two of the most important questions are:

(a) "What should be the RF exposure level in public places?"

(b) "When should manufacturers be excused from evaluating if their cellular or other hand-held phone products cause RF exposure limits to be exceed?

As shown at p.14-18, for both of these questions, FCC did not follow what it proposed to the federal health agencies in its draft. Instead of using the more stringent NCRP 17.4.3 [at p.79] 'general population limits to apply to public thoroughfares, FCC uses limits for occupational/controlled exposure that are 500% of these general population RF limits that FCC proposed to the federal health agencies to apply to public thoroughfares.

Similarly, FCC excludes from evaluation of compliance with the safety limits cellular phones (900 MHz) even though it told the federal health agencies it would defer such action regarding any type of hand-held phone. Moreover, it allows exclusion from such evaluation phones with output power up to 580 milliwatts [#72-73 at p.76-77]– which is more than 300% of what FCC said was the output power above which under worst case conditions RF exposure can exceed safety limits [#71, at p.75-76].

These two differences between what FCC proposed and what it did are not 'minor points'. Rather they are amongst the most significant points of the entire rule making. If the FCC rules are allowed to stand, then RF exposure limits will be 500% of what FCC proposed to the federal health agencies to apply to the nation's public thoroughfares (side walks, parks, beaches, bus stops, etc.) This is a major public

health issue and alone deserving of this Court reviewing whether FCC exercised proper delegated authority.

What other proposal reverses occurred between the FCC staff recommendations and what the FCC did we may never know – since FCC will not reveal the document to which agencies responded.

Therefore, FCC cannot say its guidelines have the support of the federal health agencies with delegated authority on RF health issues since neither the Court nor the public know what was in the document to which the federal health agencies responded. This Court ruled, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and choice made.' " [Motor Vehicles Id. 43 [citations therein omitted].

Rule 10 says when a Court departs far from accepted judicial procedure, then supervision may be needed. Here the Second Circuit is not troubled that incessant FCC claims of health agency support rest on a document FCC keeps secret and admits may not reflect the final rule (p.83). Allowing this practice greatly threatens democratic process. Moreover wireless technology is sweeping the nation and the health of 100s of millions of people can be affected. These considerations justify the Court's attention. The Court need NOT decide if FCC 'flipped' on what it proposed, but only that important FCC conclusions of health agency support cannot stand when support is based on a secret document, so the rule making is unlawful. [since even FCC admits there could have been changes after the draft was seen by the health agencies [p.83]

Question 5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption

and sec. 253(b) provides for States protecting public safety?

In addition to the argument in petitions of Worsham and Fichtenberg, consider the following:

1. Local regulation to protect health is within the permitted by the provisions of 42 USC 332(c)(3)(A) [at p.44] regarding the "other terms and conditions" local jurisdictions can regulate. The Committee report explicitly mentions zoning authority is retained without any restrictions [p.46]. Therefore, Congress has explicitly granted authority to regulate RF radiation to protect health, and unless it later explicitly limited such authority, FCC is powerless to exceed its authority and preempt what Congress has said is off limits to FCC. Thus, while Congress certainly permitted FCC to regulate the operations of its licensees bar local jurisdictions for also doing likewise, particularly regarding zoning authority and to protect health.

2. In the same section 47 USC 332, are the different terms 'safety of life' [47 USC 332(a) at p.44] and the contested "environmental effects" in 332(c)(7)(B)(iv). Different terms mean different things. Accordingly, the preemption pertaining to 'environmental effects' does not pertain to local regulations to protect safety of life, including regulation to protect the public health from RF radiation from FCC licensed facilities.

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definitions define "environment" without any reference to health (p. 37).

4. The legislative history favors preventing such FCC preemption. While HR 1555 and its Committee report strongly supports the FCC position, the Joint Conference report does not. Because:
   (a) The Senate version of the Bill did not even include a

zoning preemption section as did the House. This suggests the Senate did not accept the findings of the House of Representatives.[p.47-49, p.51]

(b) Mention in HR 1555 Committee Report of the need for "uniform, consistent requirements with adequate safeguards of the public health and safety" are completely removed from the final Joint report.

(c) The Joint version removes entirely any direction to FCC about protecting health [p.55] and refers only to 'environment.' Congress is expected to provide direction when it issues a preemption., especially to protect the public health. Accordingly, if Congress intended to preempt health, one is hard-pressed to explain why Congress would remove direction for such preemption (although arguably inadequate) from the House Committee report. Similarly, if the Joint Committee [p.53-56] intended to preempt local RF radiation public health and safety regulations it would not have removed language already in the House Committee report explaining this was intended.

5. 47 USC 253(b) [at p.40] explicitly provides for States being able to regulate to protect the "public safety and welfare" even if it may cause a 'barrier to entry.' As a separate basis for State authority the section also authorizes States to "safe guard the rights of consumers;" The Committee text chooses to explain only what such safeguarding may includes. So this was all that was thought in need of clarification. Just because it was not commented upon, it is still a valid State authorization.

6. Both previous and present FCC regulations set no compli ance requirements for staying within its RF limit guide lines – other than to submit an "Environmental Asses sment" if limits are exceeded. It is very challenging to believe that Congress intended local RF public health

compliance limits to be replaced by a the requirement merely that an operator must submit some "Environmental Assessment" when his facilities exceed FCC RF guidelines.

See par. #4 of NPRM, JA 0376 showing this FCC policy was in effect at least from 1985 and continuing in effect when the preemption statute became law. In its First Order (Report & Order) FCC acknowledges, "As was true for the previous rules, there are no specific compliance requirements as such." [Appendix A, Final Regulatory Flexibility Analysis, Sec.IV. subsection: Other compliance requirements, at p.78, JA 705]

Here FCC argues that the requirement to do an EA is a "de facto compliance requirement" in order "to avoid the preparation of a costly and time-consuming EA." But FCC provides no data for such a conclusion, and admits there is little data since "EAs are rarely filed." Indeed, FCC needs to explain why it disbelieves that the more likely scenario are computer generated reports run off a 'paper-mill' requiring almost no time or cost.

7. The 'conditional phrasing' of the syntax of the preemption statute argues against the FCC and Second Circuit interpretation.

The statute does not say that under all circumstances are local jurisdiction regulations of RF to be preempted if they are more stringent than those of the FCC. Rather, only if they are based "on the environmental effects" of RF radiation. Thus, the very syntax implies there are conditions for which local jurisdiction regulation of RF may not be preempted. What else could this be but to protect the public health?

Question #6: Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement

FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

In addition to the comments in submitted petitions on this question,, consider the following amplification on the comment in petition #00-407 that,

> "Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning [regulation of personal wireless services facilities], that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk." [at p. 36 of #00-047].

The Court has noted,

"For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters [policy making decisions] would be an infringement upon the powers properly vested in a coordinate coequal branch of government. [*Owen v. City of Independence*, 445 U.S. 622, 648 (1980)] Citing *Johnson v. State*, 69 Cal. 2d 782, 794, n.8 447 P.2d 352, 361 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.").

The Court continues,

"In order to ensure against any invasion into the legitimate sphere of the municipality's policy making process, courts have therefore refused to entertain suits against the city for "either the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." *Owen* Id. 648 and citations therein.

But one question is how "in good faith" could a local jurisdiction reverse its requiring personal wireless services facilities to be subject to zoning and permitting regulations?

The Supreme Court has stated,
"Revocation constitutes a reversal of the agency's former views as to the proper course. * * * Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 42.]

While the above was applied to federal agencies, the same reasoning applies to a test of "in good faith" should a local jurisdiction abandon zoning and permitting of cellular towers and other personal wireless services facilities. What good reason could a jurisdiction give to demonstrate 'in good faith'?

Abandonment would subject the public and businesses to risk of damage to property and life and damage to the characteristics of neighborhoods. In *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) Fourth Circuit Judge Niemeyer notes some of these obvious disastrous consequences.

Could the local jurisdiction claim it wanted to avoid approving facilities based on FCC guidelines? No. It makes no sense. By abandoning the field with no federal program to take its place, the City is giving its implicit approval for any cellular phone tower or other personal wireless services facility to be built any way any where.

Could the local jurisdiction claim it would let a fed-

eral program license such facilities and so let the federal program feel the brunt of public displeasure? No. Because it is the local jurisdiction that will face any liability and other consequences of such abandonment, given there is no federal zoning and permitting program. Thus the essential "in good faith" test that provides local jurisdiction immunity would fail.

Accordingly, "The innocent individual who is harmed by an abuse of government authority is assured that he will be compensated for his injury." *Owen* Id. 657. Since no rational reason could be given for a local jurisdiction to abandon the above zoning and permitting, with no suitable federal program to take its place, there are good grounds to believe that such abandonment would be considered an abuse of government authority.

In Owen, the Court also noted, "[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality in its charter or by statute, the State had impliedly withdrawn city's immunity from liability for nonperformance or misperformance of its obligation." *Owen* Id. at 646 with citations therein.

If the Court will grant hearing this question, then numerous examples of State law requiring its local jurisdictions to act to protect property from damage will be cited. Since there is no rational basis a local jurisdiction could offer for abandoning cellular tower zoning and permitting when there is no federal program suitable to take its place, as noted above, local jurisdictions subject to such State requirements will be liable for damages to property due to such abandonment.

The Court also noted that under 42 USC 1983, relief from deprivation of 14th amendment rights might be brought to a federal court, that "a municipality can be li-

able under1983 only where its policies are the "moving force [behind] the constitutional violation." [*Canton v. Harris*, 489 U.S. 378, 389 (1989) (with citations therein).

The Court continued, "Only where a municipalities failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under 1983." *Canton* Id. at 389. It is blatantly obvious what the adverse impacts would by on endangering lives and property should a municipality abandon zoning and permitting of cellular phone towers when there is an absence of a suitable federal program to take its place, as Judge Niemeyer notes above. Hence, such abandonment would subject the jurisdiction to liability risk.

For the above reasons, the choice of abandonment is a choice to take on significant liability risk. This 'choice' to accept a liability risk was found in *New York v. United States*, 505 U.S. 144 (1992) to be a commandeering of state or local government and thus unconstitutional.

> "Because an instruction to state governments to take title to waste standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two." *New York* Id. at 505 U.S. 144, 176.

Since the 'choice' of abandonment results in damage and liability risk it is no real choice, and for reasons the same as New York (regulate or accept liability) the preemption is de facto commandeering of state or local government.

The above provides important characteristics of this preemption that distinguishes it from other related Supreme Court cases. For example in *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, the Court held there was no commandeering and valid preemption in part because "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Hodel* Id. at 288.

However, in our case, if local jurisdictions abandoned zoning and permitting of cellular phone towers and other personal wireless services facilities there is no suitable federal program to take its place.

In *Federal Energy Regulatory Commission (FERC) v. Missippi,* 456 U.S. 742, the Court did entertain the option that the choice put to the States – that of either abandoning regulation of the field altogether or considering federal standards – may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism. " [*FERC* Id. at 766].

However, in the case of *FERC*, abandonment of a state utility regulatory authority would not lead to the chaos and risk to loss of life and property were cellular phone tower zoning abandoned. Nor would it put the state or local jurisdiction at likely liability risk. Rather, abandonment could merely affect utility rates, procedures for hearing complaints, and related utility matters and which occurred already for existing unregulated utilities.

Similarly, in *Garcia v. San Antonio*, 460 U.S. 528, if the San Antonio Metropolitan Transit Authority abandoned the field of transit services, it may likely cause

transit difficulties for the public and business. However, these difficulties would not put the authority at liability risk, as would the abandonment required to avoid regulating according to the FCC RF exposure preemption.

Therefore for the above reasons, while FCC in its brief before the Second Circuit used *Hodel, FERC* and *Garcia* to justify the constitutionality of its preemption [FCC Brief at 41-43] its reliance on these cases is misplaced. Similarly, Judge King in Petersburg Cellular gives arguments similar to those of the FCC and which are likewise misplaced. The test is not whether a local jurisdiction function is 'traditional' or not – which *Garcia* said was no longer a helpful criteria. Rather a proper test criteria is whether by abandoning a critical local jurisdiction function when there is no suitable federal program to take its place, the local jurisdiction puts itself at liability risk or otherwise must face not a difficult choice, but an 'impossible' choice.

For example, suppose the section of the Brady gun control act found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) was crafted in an alternative form to appear as a conditional preemption, similar to the language in FERC. That is, suppose just like FERC stated that 'if there is a state utility authority' it must do certain things, suppose a hypothetical Brady gun control act said 'if a local jurisdiction has a chief law enforcement officer ("CLEO"), then the local jurisdiction must require the CLEO to do certain things. Like FERC, would the Court say, "Nothing requires the local jurisdiction to act as provided. It has the choice – although 'a difficult one' of abandoning the field of law enforcement"? Abandoning state utility regulation is a possible choice, but abandoning law enforcement is not.

The 'choice' of abandoning law enforcement would cause such chaos and loss of life and property, and put the jurisdiction at liability risks, is an impossible choice. Likely the

Court would find it so and rule that this hypothetical reformulation of the unconstitutional Brady gun control provision is de facto commandeering and still unconstitutional regardless of the guise in which it is worded.

In a similar manner the FCC preemption in this case also presents an impossible choice of abandonment. The FCC preemption that provides the forced choice of accepting liability (or other impossible choice) or regulate according to the federal program – becomes 'de facto' commandeering based on the principles in *New York* above, and is unconstitutional.

Conclusion

For the above additional reasons a writ of certiorari should be granted for the supported petitions.

Respectfully submitted,

Bill Jenkins,
Respondent, pro se
PO Box 112
Cosmopolis,, WA 98537 Executed October 5, 2000
(360) 532-8690

Appendix B

40 CFR § 302.3 Definitions.

As used in this part, all terms shall have the meaning set forth below:

The Act, CERCLA, or Superfund means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

Administrator means the Administrator of the United States Environmental Protection Agency (``EPA"); Consumer product shall have the meaning stated in 15 U.S.C. 2052;

Environment means (1) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (2) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient 304air within the United States or under the jurisdiction of the United States;

42 USC Sec. 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken

in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

47 U.S.C. Sec. 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to

require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public
rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for
designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 253--REMOVAL OF BARRIERS TO ENTRY

Senate bill

Section 20(a) adds a new section 254 to the Communications Act and is intended to remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation re-

quired is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of elec-

tric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the
provision would not apply to providers of CMS.

47 U.S.C. Sec. 309. Application for license

[In 1993 Pub. L. 103-66, Sec. 6002(a), added subsec. (j).]

(j) Use of competitive bidding

Subsec. (j). Pub. L. 103-66, Sec. 6002(a), added subsec. (j).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission

shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combina-

tions or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

47 USC Sec. 332. Mobile services
(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or
(4) increase interservice sharing opportunities between private mobile services and other services.

47 USC 332(c) Regulatory treatment of mobile services
(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

House Report 103-111 of 103rd Congress, 1st Sess. 261 (1993). Comments on 47 U.S.C. 332(c)(3)(A)

It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By, 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'.

House Bill HR 1555. SEC. 107. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) National Wireless Telecommunications Siting Policy.--Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

``(7) Facilities siting policies.--(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

``(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account--

``(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

``(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

``(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

``(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

``(C) The policy prescribed pursuant to this paragraph shall ensure that--

``(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof--

``(I) is reasonable, nondiscriminatory, and limited to the

minimum necessary to accomplish the State or local government's legitimate purposes; and

``(II) does not prohibit or have the effect of precluding any commercial mobile service; and

``(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

``(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

``(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

``(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.--Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.--Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for

the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

House Committee Report 104-204, 104th Cong. 1st. Sess. Section 107. Facilities Siting; Radio Frequency Emission Standards

Section 107 provides that within 180 days of enactment, the Commission is to prescribe a national policy for the siting of commercial mobile radio services facilities. Representatives of affected industries, State and local governments and public safety agencies are to be included in the negotiation committee. It is the Committee's intent that the Commission establish a negotiated rulemaking committee authorized by the Negotiated Rulemaking Act of 1990 (subchapter III of chapter 5, Title 5 of the U.S. Code) comprised of representatives of State and local governments, public safety agencies and affected wireless telecommunications (Commercial Mobile Radio Service)
industries. The committee is to develop a uniform national policy for the siting of Commercial Mobile Radio Service (CMRS) facilities for antennas, cell sites and other infrastructure-related equipment necessary to provide efficient wireless telecommunications services to the public.

The committee's recommendations must ensure that (1) State and local regulation is reasonable, nondiscriminatory, and the minimum necessary and does not have the effect of precluding any commercial mobile service; (2) siting requests are acted upon within a reasonable period of time; and (3) denials of requests are issued in writing and supported by substantial evidence. The siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission RF emission regulated levels. The Commission is to complete within 180 days its action on RF emission standards. The Federal Government, within 180 days after enactment, is to prescribe procedures to make available to wireless telecommunications providers property and rights-of-way under its control on a fair, reasonable and nondiscriminatory basis.

The Committee finds that current State and local
requirements, siting and zoning decisions by non-federal units

of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

The Committee recognizes that there are legitimate State and local concerns involved in regulating the siting of such facilities and believes the negotiated rulemaking committee should address those matters, such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way. The intent of the Committee is that requirements resulting from the negotiated rulemaking committee's work and subsequent Commission rulemaking will allow construction of a CMRS network at a lower cost for siting and construction compatible with legitimate public health, safety and property protections while fully addressing the legitimate concerns of all affected parties and providing certainty for planning and building.

The Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government, solely on the basis of RF emissions, should block the construction of sites and fa-

cilities or installation of equipment which comply with the Commission RF standards. The Commission is directed to develop and issue procedures to make available to the maximum extent possible the use of Federal Government property, rights-of-ways, easements and any other physical instruments and appropriate assets that could be used as CMRS facilities sites that do not conflict with the intent of other Federal laws and regulations. The Committee recognizes, for example, that use of the Washington Monument, Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate and use of them would be contrary to environmental, conservation, and public safety laws.

TELECOMMUNICATIONS ACT OF 1996
Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 704—Facilities siting, radio frequency emission standards

Senate bill :
No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The

conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or
modification of CMS facilities should be terminated.

When utilizing the term `functionally equivalent services' the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase `unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat
facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase `substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term `final action' of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under

the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

C1

Appendix C: Affidavits and other documents

- Alison Rall: Reports shortly after a 400 foot cellular tower was erected next to their farm that their beef herd became sickly, egg production dropped, wild fowl left the area, dairy cows had "many miscarriages, birthing problems, suckling problems, and many of them developed tumors. * * * Our five children all began experiencing frequent nosebleeds, hair loss, weight loss, and kidney problems."

- **David Fichtenberg:** "Because of our purpose, AHA (Ad Hoc Association), and I believe all of our members, want to influence local public officials so they may establish regulation of RF more stringent than those of the FCC to protect health, safety, and quality of life. * * * AHA has been harmed because it believes its members and the public it serves would likely have benefited from more stringent RF exposure limits had the studies it submitted to the FCC been evaluated.

- **Charles R. Manville:** "In June 1997 [one month after installation of a cellular tower I began to experience frequent headaches and dizziness when I was at my home on Willis Hill. * * * Until I began to experience headaches and dizziness in June, I had never experienced recurrent headaches or dizziness and had been in excellent health. * * * In September I spent a week on Penobscot Bay, Maine and my headaches went away completely. Those headaches and dizziness returned within a day of my return to Willis Hill.

Affidavits continued:

- **Janet and Dale Newton, Lorinda Knowlton, Roger H. Knowlton, D.O.** :"When I attended hearings on this subject [cellular phone tower zoning and permitting] I was informed that there could be no discussion in the record on environmental or health concerns again for fear of a court challenge by any provided that decisions were even indirectly based on health or environment concerns."

- D. Fichtenberg, supplementary affidavit:

Declaration of
David Fichtenberg
PO Box 7577
Olympia, WA 98507-7577

Pertaining to Supreme Court of the United States,
Petition for certiorari of David Fichtenberg, docket #00-0407

I, David Fichtenberg, hereby declare that I am over 21 years old and reside in King County of the State of Washington.

On June 10, 1998, I submitted an affidavit pertaining to Court of Appeals for the Second Circuit consolidated cases 97-4328(L), 98-4003 (Con.), 98-4005 (Con.), 98-4025(Con.), 98-4122(Con.). Since then, significant changes of which I am aware are: (1) parties who were Ad Hoc Association members and whose interest Ad-Hoc Association had sought to represent in the Second Circuit proceeding above have since chosen to have their interests and representation furthered through the law firm of Landy & Seymour. They have had a Petition for Writ of Certiorari filed in their behalf (Citizens for Appropriate Telecommunications Facilities et al. ("Citizens"), docket #00-00393) by counsel of record Whitney North Seymour, Jr. of the firm of Landy & Seymour. Among these are persons whose names also appear in

my June 10, 1998 affidavit are Dorothy Miller, Holly Fournier, and Libby Kelly. Please see the Citizens petition for a complete list of the names of these parties. (2) Also a motion to the Second Circuit in the above proceeding there was filed August 27, 1998 to correct my June 10, 1998 affidavit by clarifying that Cellular Phone Taskforce was not a member of Ad-Hoc Association.

I remain President of Ad-Hoc Association. Some of our members who participated in the proceeding below are Alan Golden, Virginia J. Moore-Ward, Rainer Waldman Atkins, Michael C. Worsham, Bill Jenkins, and Faye Mueller-Hebert. My principal duties are to carry out the Ad-Hoc Association mission is described in my June 10, 1998 affidavit, at pages 11-15 of my above petition for writ of certiorari, and at pages 2-6 of the principal brief in which Ad-Hoc Association and I joined in the Second Circuit proceeding. I am being harmed in carrying out my duties for Ad-Hoc Association in the manner as described in these referenced pages for Ad-Hoc Association to further its mission.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: October 4, 2000

Signed: /s/ David Fichtenberg

_____

David Fichtenberg

Notice that all parties to proceeding below, except CPT Joined in same brief and reply

October 7, 1998

Carolyn Clark Campbell, Clerk
U.S. Court of Appeals for the Second Circuit
United States Court House, 40 Foley Square
New York, New York 10007

Re: Cellular Phone Taskforce, No. 97-4328, and consolidated cases

Attention: Michael Adragna

Dear Ms. Campbell:

Petitioners in the referenced cases filed initial briefs May 22, 1998 and reply briefs July 27, 1998. Two of the Petitioners, Ad-Hoc Association et al. and CWA filed jointly. The second set of briefs came from a single party, Cellular Phone Taskforce.

As you know, the caption of the case recites the names of a number of other individuals and associations who are participating in the appeals. Originally, they were co-petitioners, with Ad-Hoc Association, in Nos. 98-4003 or 98-4025 filed respectively in the D.C. and Ninth Circuits.

The purpose of this letter is to clarify that these individuals and associations are also joined – through common representation with Ad-Hoc Association – in the initial and reply briefs submitted by Ad-Hoc Association and CWA. Specifically, all the captioned parties except Cellular Phone Taskforce are joined in the briefs submitted by Ad-Hoc Association and CWA/CWA Local 7810.

We appreciate the Court's indulgence in permitting this clari-

fication. Please direct any questions to the undersigned.

Sincerely,

/s/ James R. Hobson
James R. Hobson
Counsel for Ad-Hoc Association et al.

c.c. Michael Adragna; all parties of record

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of RAINER VALLEY ASSOCIATION FOR SAFE WIRELESS TECHNOLOGY	Hearing Examiner File No. MUP-96-038 DCLU File No. 9603542

ORDER OF DISMISSAL

This matter involves property located at 4213 South Orcas Street. Under application 9603542, the applicant (the Walter Group) proposed construction on the property of a minor communication utility consisting of 12 panel type antennae. On October 10, 1996, DCLU published notice of its decision, in which it recommended that the required Council Conditional Use be granted, and in which it entered a Determination of Non-Significance (DNS). The effect of a DNS is to relieve the applicant of the need to prepare an Environmental Impact Statement (EIS).

On October 24, 1996 David Fichtenberg filed an appeal on behalf of the Rainier Valley Association for Safe Wireless Technology, challenging the failure of DCLU to require an EIS. That appeal was based on the possible environmental impacts of the radiofrequency radiation that would be associated with the proposed facility.

On October 31, 1996, the applicant (the Walter Group) filed a motion with the Hearing Examiner seeking dismissal of the

appellant's SEPA appeal. In this motion, the applicant argued that the federal government had preempted the ability of State or local government to regulate wireless service facilities on the basis of the environmental effects of radio frequency emissions.

A response to the applicant's motion was filed by the appellant on November 12, 1996. In that response, the appellant contested whether the federal government had, indeed, preempted local control over questions of radio frequency emissions. The appellant also argued that even if there was preemption, an EIS should still be prepared.

As to the first issue, the Telecommunications Act of 1996 added the following paragraph (iv) to 47 USC sec. 332(c):

> "No State or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions."

In August of 1996, the FCC issued its "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation [ET Docket 93-62 (FCC 96-326)]. That order adopted Maximum Permitted Exposure (MPE) standards.

The proposed facility complies with the FCC's MPE standards. Accordingly, the City of Seattle is preempted from regulating the proposed minor communications utility on the basis of the environmental impacts of its radio frequency emissions.

The second issued then is whether, in the face of this preemption, the Hearing Examiner retains the ability to require an EIS in this case. The answer to that question is "no."

SMC 25.05.340(A) provides that a DNS is appropriate when the responsible official determines that "there will be no probable sufficient environmental impacts from a proposal . . . . SMC 25.05.4000 sets forth the purpose of an EIS; Paragraph B provides that an EIS "shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality."

The appellant's appeal is based entirely on the possible environmental effects of RF radiation. Therefore, to reverse the Department in this case, the Examiner would have to determine that environmental impacts of RF radiation, the very thing over which the City has no jurisdiction, creates a "probable significant impact." Moreover, because the City is preempted from regulating the proposed facility on the basis of the environmental effects of RF radiation, any EIS prepared to explore those impacts could not be used to regulate or mitigate whatever adverse impacts there were revealed. This would be an absurd result.

This is not to suggest that the construction of a minor communications utility could never require the preparation of an EIS. Such a requirement could still be appropriate when other impacts from protected City viewpoints, etc. were at issue. However, such concerns were not raised by this appeal.

On the basis of the above, this appeal from the Determination of Non-significance entered by DCLU in this case should be, and hereby is, DISMISSED. The pubic hearing on November 26, 1996 will be limited to testimony and evidence regarding the proposal's compliance with the requirements for a council conditional use.

Entered this 14th day of November, 1996.

/s/ Guy E. Fletcher
Guy E. Fletcher, Deputy Hearing Examiner

C 9

Office of Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104
(206) 684-0521
(2 0 6) 6 8 5 - 0 5 3 6 (F A X)

C10

(66)

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010
from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use	ORDER ON MOTION TO DISMISS

The Department has moved to dismiss certain issues from the above-referenced appeal. Both the Department and the appellant have submitted written information regarding the motion, and the motion was discussed at the prehearing conference on this matter. The appeal issues are identified in the appellant's appeal letter dated November 3, 1999. At the conference, appellant and the Department agreed that the issue pertaining to failure to provide notice of the DNS should be dismissed.

Many of the other issues raised by the appellant's appeal letter are not properly the subject of a SEPA appeal in this case, for they relate to matters that are not changed by the ordinance. The appellant has argued that the failure to amend the ordinance (in particular, the radio frequency (RF) standards) in certain ways will have an impact.

* * *

Entered this 6th day of December, 1999

/s/ Anne Watanabe
Anne Watanabe, Deputy Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104-2222
(206) 684-0521
FAX: (206) 684-0536

C12

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010

from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use

The Director issued as Determination of Non-Significance (DNS) regarding a proposal to amend Title 23 and Title 25 of the Seattle Municipal Code. The appellant exercised the right to appeal pursuant to SMC 25.05.680.

The appeal hearing was held on December 13, 1999, before the undersigned Deputy Hearing Examiner (Examiner). Parties represented at the proceeding were: the appellant, SAANE et al, by David Fichtenberg; and, the Director, Department of Design, Construction, and Land Use (DCLU by Bernard J. Glynn Jr., Assistant City Attorney.

* * *

The Determination of Nonsignificance issued by the Director is hereby AFFIRMED.

Entered this 5th day of January, 2000.

/s/ Anne Watanabe
Anne Watanabe
Deputy Hearing Examiner

C13

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Office of
The Chairman

Federal Communications Commission
Office of the Secretary

July 1, 1996

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Carol:

I am writing to follow-up on our phone conversation of several weeks ago regarding radiofrequency (RF) emissions and Commission's efforts to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. This is one of the more important issues we are wrestling with, and I believe it is critical that we do all we can to protect the public and workers from any potential health effects from the radio services we license.

As you know, in 1993, the FCC released a Notice of Proposed Rule Making (NPRM; ET Docket 93-62) seeking public comment on these issues. At that time we requested that EPA and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers.

Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the EPA as well as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the National Institute for Occupational Safety and Health (NIOSH).

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the EPA recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, NIOSH believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard. Similarly, the Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the EPA and by the other federal health and

safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Read E. Hunt
Read E. Hunt
Chairman

C16

(72)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Federal Communications Commission
Office of the Secretary

July 2, 1996

D. Bruce Burlington, M.D.
Director
Center for Devices and Radiological Health
U.S. Food and Drug Administration
Mail Code HFZ-1
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Burlington:

In 1993, the FCC released a Notice of Proposed Rule Making (NPRM ET Docket 93-62) to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. At that time we requested that the Food and Drug Administration and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers. Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the FDA as well as from other agencies.

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure

guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the U.S. Environmental Protection Agency recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, the National Institute of Occupational Safety and Health (NIOSH) believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the FDA and by the other federal health and safety agencies. Genera1ly, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, simi1aT to NCRP); 3) deferring adoption of

the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering and Technology

Excerpts from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996)

43. Accordingly, "occupational/controlled" exposure, as used by the Commission, will apply to situations in which persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over the their exposure. Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits (see below), as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means. We will apply the occupational/controlled exposure limits to amateur radio operators and members of their immediate household, as discussed later (see para. 162, infra).

47 CFR 1.1310 NOTE 1 TO TABLE 1: Occupational/ controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/ controlled exposure also apply in situations when an individual is transient through a location where occupational/ controlled limits apply provided he or she is made aware of the potential for exposure.

71. Based on the concerns expressed by the FDA, we are not adopting at this time low-power device exclusions based on radiated power, as contained in the 1992 ANSI/ IEEE guidelines. As discussed above, the FDA cites recent studies indicating that cellular telephones and other hand-held transmitters that meet ANSI/IEEE radiated power exclusion limits can exceed the corresponding exclusion limits for SAR. In one of those studies, the highest SAR values were

measured when the antennas and cases of various hand-held cellular telephones were placed in direct contact with a head model, i.e. less than 2.5 cm from the head. Of six telephone models tested in this study under these "worst case" conditions, the highest SAR obtained was approximately 8.8 mW/gram (8.8 W/kg) for 1 watt of output power. This SAR exceeds the recommended limit of 1.6 W/kg for an uncontrolled environment, suggesting that an appropriate radiated power exclusion level for ensuring that the 1.6 W/kg SAR limit could not be exceeded under "worst case" conditions would be on the order of 180 mW at 900 MHz. The ANSI/IEEE low-power device exclusion clause allows for exclusions at a power level of 700 mW at 900 MHz provided a separation of 2.5 cm is maintained between the radiating structure of the device and the body of the user, although, as discussed earlier, comments submitted in this proceeding maintain that the 2.5 cm distance was not meant to apply to the head.

72. This study also reported SAR values measured when the telephones were positioned normally against the head model (i.e., less than 2.5 cm from the head), but with the antenna at various angles and distances from the head. This was referred to as "standard" handling of the telephone. For this "standard" operating situation, the highest SAR measured from the six models tested was approximately 2.8 W/kg for 1 watt of power. This implies that, for the "standard" exposure condition, an appropriate "worst case" radiated power level to meet the 1.6 W/kg SAR limit at 900 MHz should be on the order of about 570 mW, not 700 mW as recommended by the 1992 ANSI/IEEE standard. Similarly, recent data submitted to our laboratory analyzing SAR values for hand-held PCS devices operating near 2 GHz shows that at 125 mW of average power maximum, SAR values (averaged over 1 gram) can, in some cases, be up to 80-90% of the 1.6 W/kg limit. The 1992 ANSI/IEEE radiated power exclusion clause applies only to frequencies up to 1500 MHz. However, if this exclusion were extrapolated to PCS frequencies (1850-1990 MHz), the radiated power exclusion limit would be in the

range of 300-350 mW, more than twice the 125 mW used by the devices tested. Therefore, it would appear that some devices that would qualify for the radiated power exclusion in the 1992 ANSI/IEEE standard might exceed the SAR limit of 1.6 W/kg.

73. As noted by the FDA, these studies raise questions about the accuracy of the low-power device exclusions based on radiated power as contained in the 1992 ANSI/IEEE guidelines. We acknowledge, however, that all of the transmitters in the devices in these studies were placed directly against the head and did not maintain the 2.5 cm separation distance required by ANSI. However, as discussed above, it is unclear whether that separation distance was meant to apply to the head. In light of these outstanding issues and questions, we do not feel that, at this time, it is appropriate for us to adopt the low power exclusion. On the other hand, we also recognize that to require SAR evaluation of every low-power transmitting device subject to Commission authorization would prove to be a costly and unnecessary burden for many manufacturers. Therefore, at this time we will require only routine SAR evaluation for the devices noted above that constitute the classes for which there appears to be the greatest potential for exposure because of their relatively higher duty factors. Based on additional scientific evidence that may be forthcoming, we may consider modifying or expanding this requirement, and we may also consider whether a modified exclusion clause based on radiated power can be adopted.

Notice FCC 96-326, Appendix A: Final Regulatory Flexibility Analysis

4. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Other Compliance Requirements

As was true for the previous rules, there are no specific compliance requirements, as such. Under the Commis-

sion's NEPA rules, applicants and licensees are required to submit an Environmental Assessment (EA) if they do not comply with our RF exposure guidelines (47 CFR § 1.1311). An EA is a detailed accounting of the consequences created by a specific action that may have a significant environmental impact, in this case a Commission authorization of a transmitter or facility that exceeds the RF guidelines. An EA would be evaluated by the Commission to determine whether the authorization *should be granted in view of* the environmental impact. In reality, this leads to a de facto compliance requirement, since most applicants and licensees who are not categorically excluded (see above) undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA. For this reason EAs are rarely filed with the Commission. This has not changed from the existing rules.

National Radiation Protection and Measurement (NCRP) Report 86: Biological Effects and Exposure Criteria For Radiofrequency Electromagnetic Fields.
Sec. 17.4.3 Time Averaging for the General Population

The time base by which to average the limiting *SAR* for occupational exposure is 0.1 h (6 minutes). For exposure of the general population an averaging period of 0.5 h (30 min) is recommended. The increased stringency of the general-population limit allows this liberalization with no significant additional risk because the population limit, along with the 30-min time-averaging period, restricts the maximal *SA* to the population during the 30-min period to a value of no larger than that experienced during the 6-min time-averaging period of occupational exposure. Overall, the SA for the population remains at one-fifth that of the occupational value. At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM sources, and brief exposure to civil telecommunications systems. [emphasis added]

c24

(80)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL] MAR 20, 1998

Mr. Arthur Firstenberg
P.O. Box 684
Norwich, N.Y. 434-4499

This is in response to your request of March 9, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. Sec 552. You request a copy of the draft Report & Order, dated July 2, 1996 in ET Docket No. 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC").

As your letter notes, I recently denied a request for the identical document filed by Mr. James Hobson. You attached a copy of my denial to your request. As I stated in my denial to Mr. Hobson, the draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec.0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). For the reasons set forth in my letter to Mr. Hobson, a copy of which is appended hereto, I am hereby denying your above-referenced request. You may file an application for review of any part of this decision with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F. R. Sec. 0.461(i).

Sincerely;

/s/ Richard M. Smith
Chief
Office of Engineering & Technology

Enclosure

C25

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

James R. Hobson, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave – Suite 750
Washington, D.C. 20005

Dear Mr. Hobson,

This is in response to your request of February 11, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U. S.C. Sec. 552. You request copies of the draft Report & Order, dated July 2, 1996 in ET Docket 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC") as well as any transmittal letter or Memorandum from the FCC to IRAC member agencies that summarizes or explains the contents of the draft Report & Order.

The draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec. 0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). It was clearly part of the deliberative process of the agency in that it represents the recommendation of the Office of Engineering & Technology made in consultation with other Commission Bureaus and Offices, to the FCC Commissioners.

Release of the draft document would threaten "the give and take of the deliberative process" see Chemical Manufacturers Ass'n v. Consumer Prod. Safety Comm. 600 F.Supp. 114, 118(D.D.C 1984). The deliberative process aspect of Exemption 5 is rooted in three distinct policy purposes: (1) to en-

courage frank discussion within Government; (2) to prevent public confusion that could result from the disclosure of the internal debate prior to the formulation of agency policies; and (3) to guarantee that the Government will be judged on positions actually adopted rather than on factors considered in reaching such positions. Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). The concerns underlying Exemption 5 are directly applicable to the instant case.

Nor does the fact that the draft Report & Order was circulated to the IRAC alter the privileged nature of the document. The draft Report & Order was circulated to the IRAC as part of the normal IRAC review process applicable to decisions which could have an impact on other federal agencies. It was apparently submitted to the IRAC without any cover letter or other transmittal memorandum. All comments received were, if written, placed in the docket of the proceeding and, if oral, were summarized, and summaries thereof were placed in the docket file.

Exemption 5 and Sec. 0.457(e) clearly protect interagency documents as well as intra-agency documents. Indeed, it would undermine the purpose behind the exemption if a document which would, in absence of disclosure to other agencies pursuant to the IRAC process, be a privileged intra-agency document, were to lose its privilege merely because the IRAC process required it to be circulated to other Federal agencies. Disclosure of the document in question would reveal aspects of the Commission's as well as of the Government's deliberative process by providing a meaningful glimpse into the thoughts of agency personnel involved in the creation thereof. Thus, the document falls within the Exemption 5 of the FOIA.

Your letter states that documents which would ordinarily be privileged pursuant to Exemption 5 "lose the protection if an agency, in the making of a final decision, chooses expressly to adopt them or incorporate them by reference." The docu-

ment in question is a draft document; neither it nor the final version of the Report & Order reflect any information not contained in the public record. The Report & Order that was eventually adopted may differ in some respects from the document in question because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC consultative process. It does not adopt or incorporate by reference any documents received from those agencies. Consequently, I do not believe the line of cases you cite in this regard is apposit.

For the aforementioned reasons, I am hereby denying your above request. You may file an application for review of any part of this initial decision which you find unsatisfactory with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F.R. Sec. 0.46(I).

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering & Technology

Footnote #1 from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996).

Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3, of "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86 (1986), National Council on Radiation Protection and Measurements (NCRP). With the exception of the limits on exposure to power density above 1500 MHz and the limits for exposure to lower frequency magnetic fields, these MPE limits are also generally based on the guidelines contained in the RF safety standard developed by the Institute of Electrical and Electronic Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI). See Section 4.1 of ANSI/IEEE C95.1-1992, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz".

Supreme Court, U.S.
FILED
DEC 4 = 2000

(3) (3) (3) (3)

Nos. 00-393, 00-407, 00-417 and 00-427

In the Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET. AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MICHAEL WORSHAM, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel
DANIEL M. ARMSTRONG
Associate General Counsel
JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998), which preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless telecommunications facilities, includes preemption of state and local regulation of the human health effects of such facilities.

2. Whether the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) violates the Tenth Amendment.

3. Whether the court of appeals correctly found that the Federal Communications Commission was not required to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, when it promulgated rules implementing the provisions of that Act.

4. Whether Congress's delegation of authority to the FCC to promulgate rules governing the environmental effects of radiofrequency radiation violated the "nondelegation" doctrine.

5. Whether the court of appeals correctly found that the FCC was not required to solicit the comments of other agencies on record material newly submitted to the FCC during a reconsideration of its initial order promulgating rules governing the environmental effects of radiofrequency radiation.

6. Whether the court of appeals correctly held that the FCC's rules governing the environmental effects of radiofrequency radiation did not violate the Rehabilitation Act of 1973, 29 U.S.C. 794.

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In the Supreme Court of the United States

No. 00-393

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-407

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-417

MICHAEL WORSHAM, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-427

CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22[1]) is reported at 205 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. Petitions for rehearing were denied on June 6, 2000 (Pet. App. A23-A25) and June 15, 2000 (Pet. App. A26-A27). The petition for a writ of certiorari in No. 00-393 was filed on September 8, 2000. The petitions in Nos. 00-407, 00-417 and 00-427 were filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), requires that in connection with "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare an "environmental impact" statement (EIS) that assesses the environmental effects of a proposed project. 42 U.S.C. 4332(2)(C). Not all activities, however, are "major" actions requiring such an analysis. Under rules established by the Council on Environmental Quality (CEQ), the agency that administers NEPA, some projects require only an "environmental assessment" (EA), which may be followed by a "finding of no significant impact" (FONSI). 40 C.F.R. 1508.9, 1508.13. Other actions may be "categorically excluded" from environmental analysis. 40 C.F.R. 1508.4. Determining which level of environmental scrutiny to apply to specific categories of activities is largely left to the

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[1] Citations to "Pet. App." refer to the appendix to the petition in No. 00-393.

individual agencies. An agency must, however, define three "classes of action": those that "normally do require environmental impact statements," those that "normally do not require" any environmental evaluation, and those that "normally require environmental assessments but not necessarily environmental impact statements." 40 C.F.R. 1507.3(b)(2).

2. a. All types of wireless communications, including television, radio, cellular telephones, pagers, and similar devices, work by sending and receiving electromagnetic signals. The energy fields generated by the transmitters of radio signals, referred to as radiofrequency or RF radiation, can affect the environment. Specifically, high levels of RF energy can cause the heating of human tissue, known as a "thermal" effect.[2] In 1985, the Federal Communications Commission (FCC) implemented, pursuant to NEPA and directives issued by the CEQ, rules that specified the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543 (1985).

The exposure limits were based on RF safety standards that had been adopted in 1982 by the American

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[2] Microwave ovens work by virtue of the thermal effect of extremely high levels of RF energy. See Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The FCC exposure limit for the general public is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect. See National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986) (reprinted at C.A. App. 305-307).

National Standards Institute (ANSI), a recognized standard-setting organization. 100 F.C.C. 2d at 551. ANSI established recommended levels of "maximum permissible exposure" or "MPE" for various radio frequencies, since various frequencies cause a thermal effect at different rates. Transmitting facilities that would not lead to human exposure above the limits were considered to have no adverse effect and required no environmental evaluation; preparation of an EA or an EIS was required for transmitters that could cause human exposure above the limits. *Id.* at 561.

In 1992, ANSI issued new RF exposure standards. At about the same time, other organizations such as the congressionally chartered National Council on Radiation Protection and Measurements (NCRP) also issued RF protection standards. The following year, the FCC began a rulemaking proceeding to determine whether it should adopt one of the new standards to replace the 1982 ANSI standards. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rule Making,* 8 F.C.C.R. 2849 (1993) (*RF Notice*).

In the course of the rulemaking proceeding, the Commission received more than one hundred comments representing a broad range of interests. The Commission's staff also consulted with and/or received comments from a number of federal agencies that are responsible for the environment, human health and worker safety: the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and the National Institute for Occupational Safety and Health (NIOSH). *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order,* 11 F.C.C.R.

15,123, 15,129-15,131 (1996) (*RF Order*). When it made its ultimate decision, the FCC gave particular deference to the views of those agencies, which are "expert agencies with respect to determining appropriate levels of safe exposure to RF energy." *Id.* at 15,135. In accordance with the suggestions of the federal environmental and health agencies, the Commission ultimately adopted new guidelines based primarily on the RF exposure limits suggested by the NCRP. *Ibid.*

Under the new RF safety rules, as under the old ones, licensees generally must determine whether their transmitters will cause human exposure above the MPE limits. If so, an EA, and possibly an EIS, must be prepared and the Commission will then determine whether to allow transmission to occur.[3] No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits. 47 C.F.R. 1.1307(b). Certain RF transmitters that operate at low power levels or in inaccessible locations and are thus extremely unlikely to cause exposure above the limits are categorically excluded from having to perform the initial assessment of RF exposure. 47 C.F.R. 1.1307(b); see also 40 C.F.R. 1507.3(b) (allowing agencies to create categorical exclusions). On petitions for reconsideration, the Commission reaffirmed the fundamentals of its initial decision. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order*, 12 F.C.C.R. 13,494 (1997) (*RF Reconsideration Order*).

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[3] As a practical matter, the FCC's experience is that licensees almost always ensure that their facilities will not cause excess exposure, and environmental analysis is rarely conducted.

b. Shortly before the Commission issued the *RF Order*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, became law. Section 704(a) of that Act, entitled "National Wireless Telecommunications Siting Policy," added a new provision to the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(iv),[4] which provides in pertinent part that "[n]o State or local government * * * may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Ibid.* In Section 704(b) of the Telecommunications Act Congress also directed that "[w]ithin 180 days * * * the Commission shall complete action in [the RF radiation rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[5]

The House Commerce Committee, which drafted the preemption provision, explained that the reason for the prohibition was that "siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" advanced telecommunications services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94-95 (1995). The Committee explained that "local zoning decisions, while responsive

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[4] All citations in this brief to 47 U.S.C. 332(c)(7) refer to Supp. IV 1998.

[5] Congress also directed, in a provision not challenged by petitioners in this Court, that state and local zoning authorities act within a "reasonable period of time" after the filing of a request to build a communications tower and that denials of such requests "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(ii) and (iii).

to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence." *Ibid.* In the *RF Order*, the Commission implemented the preemption provisions by adding Section 1.1307(e) to its rules, the language of which tracks the statute. 47 C.F.R. 1.1307(e).

c. In February 1997, the Cellular Telephone Taskforce submitted to the Commission a "complaint" claiming that the RF rules discriminate against persons who are hypersensitive to electromagnetic fields and thereby violate the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998). The Chief of the Office of Engineering and Technology, acting under delegated authority, ultimately dismissed the complaint because it addressed the activities of FCC licensees, not those of the agency itself. Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998) (C.A. App. 6119-6121). The FCC's rules implementing the Rehabilitation Act expressly do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6).

3. a. The court of appeals affirmed the the Commission's orders. Pet. App. A1-A22. The court rejected the claim that the Commission had failed to take into account whether RF energy had deleterious nonthermal effects, finding that there was "room for disagreement * * * among experts in the field" regarding whether such effects existed and that "the FCC was justified in continuing to rely on the ANSI and NCRP standards." *Id.* at A10. The court held that the FCC had committed no error by not supplying the EPA and other agencies with publicly available studies that had been submitted to the FCC during the recon-

sideration proceeding. The FCC "could reasonably expect those agencies to keep abreast of scientific developments" and to "monitor all relevant scientific input" into the FCC's decision. *Ibid.*

The court rejected the claim that the FCC had violated NEPA because it did not prepare an EIS in connection with the rules. "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." Pet. App. A17 (quoting *Environmental Defense Fund* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)). The court found that the FCC's orders "functionally satisf[ied] the CEQ's requirements for an EA and a FONSI." Pet. App. A17-A18.

The Court upheld the Commission's finding that, although 47 U.S.C. 332(c)(7)(B)(iv) precluded state and local governments from regulating the "placement, construction, and modification" of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions," that provision applied also to the operation of such facilities. The court noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference must be accorded to the FCC's interpretation of the statute. Pet. App. A20. The court also noted that the savings provision of subsection (A) of the same statute provided only that the FCC may not "limit or affect the authority of a State or local government" over "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Since "[s]ubsection (A) does not * * * preserve [state and local governments'] authority to regulate such facilities'

operations * * * the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power." Pet. App. A20.

The court rejected the claim that the preemption provision violates the Tenth Amendment. "The statute does not commandeer local authorities to administer a federal program," the court found, because "State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments * * * is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." Pet. App. A21. Straightforward preemption of that sort, the court found, does not violate the Tenth Amendment.

b. In its initial opinion, the court dismissed claims raised under the Rehabilitation Act and the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* (ADA). Similar claims made before the agency had been resolved by the staff rather than the Commission itself, the court found, and therefore had not been the subject of a final, appealable agency order. Pet. App. A6. Pursuant to a petition for rehearing, the panel decided to address the merits of the claims notwithstanding their lack of finality. The ADA claim failed, the court found, because the relevant part of the ADA does not apply to the federal government. *Id.* at A25. The claim under the Rehabilitation Act lacks merit because that Act applies only to "the discriminatory denial of the benefits of a [federal] 'program or activity,'" and the construction of RF transmitters is not a program or activity of the FCC. *Ibid.*

ARGUMENT

Four parties, Citizens for the Appropriate Placement of Telecommunications Facilities (CAPTF), Cellular Phone Taskforce (CPT), Michael C. Worsham (Worsham) and David Fichtenberg (Fichtenberg), petition for a writ of certiorari. None of the petitions raises any issue that warrants this Court's review.

1. Petitioners Worsham and Fichtenberg claim that the Second Circuit has impermissibly interpreted 47 U.S.C. 332(c)(7)(B)(iv). That statute preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless service facilities as long as the transmitter complies with the FCC's RF exposure standards. Petitioners contend (Worsham Pet. 10-14; Fichtenberg Pet. 32-35) that the court of appeals erroneously interpreted the term "environmental effects" to mean "human health effects." That claim is incorrect.

At the outset, the court below did not address the issue. The court stated in passing (Pet. App. A5) in the background section of its opinion that the preemption provision included human health considerations, but the court did not consider the question in its legal discussion and did not provide any analysis of it. For that reason alone, this case is unsuited for further review.

Moreover, the court of appeals' apparent understanding of the statute was correct and not in conflict with any decision of this Court or another court of appeals. When it enacted Section 332(c)(7)(B)(iv), Congress was clearly concerned with the biological effects of RF energy fields. The statute preempts only "to the extent that such facilities comply with the Commission's regulations concerning [RF] emissions." A tandem provision, Section 704(b) of the Telecom-

munications Act, gave the FCC 180 days to "complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Both the rulemaking proceeding and the FCC regulations to which Congress referred concerned almost exclusively the biological effects of RF energy. The original 1982 ANSI exposure standards that the FCC adopted in 1985 were based on the absorption of RF energy by the human body and the thermal effects in the human body of various levels of RF exposure. The 1992 ANSI standard, which the Commission proposed to adopt in ET Docket 93-62, see *RF Notice*, *supra*, likewise had to do entirely with human biological effects of RF fields. The statutory preemption of state and local consideration of environmental effects of RF to the degree that a transmitter complied with the FCC's rules thus necessarily was intended to include state and local consideration of biological effects.[6]

Petitioners mistakenly rely on a general presumption that ambiguous statutes should not be interpreted to preempt state law concerning health and safety. Worsham Pet. 9; Fichtenberg Pet. 33-34. That presumption does not apply where, as here, Congress's intent to preempt local consideration of biological effects is "clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940). That

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[6] The House Report discussing Section 704 of the Telecommunications Act further confirms that conclusion. The Report expressed Congress's concern that state and local authorities had interfered with the nationwide deployment of wireless communications systems for reasons that were "at times not supported by scientific *and medical* evidence." H.R. Rep. No. 204, *supra*, at 95 (emphasis added).

standard is amply satisfied by the statutory and administrative context of Section 332(c)(7)(B)(iv) as well as its legislative history. That Congress may have distinguished health effects from environmental effects (Worsham Pet. 13-14) in other statutes addressing different problems is of no moment in the face of Congress's evident intent here.

As petitioner Worsham notes, "[t]wo federal courts have essentially agreed with the Court of Appeals in the instant case." Pet. 12 (citing *AT&T Wireless PCS, Inc.* v. *City Council of Va. Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1988), and *Primeco Personal Communications* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). Petitioner Worsham asserts (Pet. 10), however, that the decision of the court of appeals "is arguably inconsistent with" the decision of the Second Circuit in *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, cert. denied, 121 S. Ct. 276 (2000). The cited passage from *Freeman* states that the term "environmental effects" is not defined in the statute and that it "focus[es] on degradation of the natural environment, effects on historical landmarks, *and the biological effects of RF radiation*." *Id.* at 325 (emphasis added). Accordingly, *Freeman* is entirely consistent with the Second Circuit's holding in this case that the term "environmental effects" includes human health considerations. In any event, further review would not be warranted to resolve an intra-circuit discrepancy.

2. Petitioners CAPTF and Fichtenberg contend (CAPTF Pet. 14-21; Fichtenberg Pet. 35-38) that the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) violates the Tenth Amendment. They claim that Congress has impermissibly commandeered the government apparatus of the states. The court of appeals correctly

rejected that claim, and its decision does not conflict with that of any other court of appeals or of this Court.[7]

Congress commandeers the legislative process of States "by directly compelling them to enact and enforce a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 161 (1992). In *New York*, the Court struck down Congress's requirement that the States either regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. *Id.* at 174-175. Having no choice other than one of the two courses set forth by Congress, the States were thus pressed involuntarily into "the service of federal regulatory purposes." *Id.* at 175. Likewise, in *Printz* v. *United States*, 521 U.S. 898 (1997), the Court invalidated a federal statute that required local law enforcement officials to conduct background checks

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[7] There is a question whether petitioners have standing to present their claim. It is our position that individuals not acting in their official capacity generally lack standing to raise a Tenth Amendment claim, since they cannot establish that any personal injury would be redressed by a favorable decision, and the rights they advance in the litigation are rights of third parties. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Warth* v. *Seldin*, 422 U.S. 490 (1975); but cf. *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999) (discussing authorities and finding standing to raise Tenth Amendment claim), cert. denied, 120 S. Ct. 934 (2000). In the court of appeals, some individuals identified as state or local government officials were among the parties. See CAPTF Pet. ii-iii. Two of them (Holly A. Fournier and Jeannine Karlsson, see CAPTF Pet. ii) are listed as petitioners before this Court, although it is not clear whether they are acting in their official capacities and whether they are asserting in this litigation rights they hold by virtue of their official capacities. In addition, individual members of a collective governmental body ordinarily do not have standing to assert the rights of the body as a whole. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986).

of gun purchasers. That requirement, the Court held, "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 933 (quoting *New York* v. *United States*, 505 U.S. at 188).

Section 332(c)(7)(B)(iv) does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all. Rather, the statute simply limits the factors state and local zoning authorities may consider in the exercise of their ordinary zoning functions. Those authorities may not deny a permit "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv). They are permitted to grant or deny permits on any other basis. Indeed, Congress expressly provided that with the exception of RF and a few other matters not before the Court, "nothing * * * shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). That proviso leaves intact all other traditional bases for land use decisions, such as aesthetics or neighborhood character, or other local zoning laws. Local authorities throughout the country have successfully rejected tower siting proposals on such grounds. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Aegerter* v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T* v. *City Council of Va. Beach*, *supra*.

This case thus falls squarely within the principle that federal law may "displace state regulation" even though

this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Indeed, this Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291; see also *Testa* v. *Katt*, 330 U.S. 386 (1947). The court below thus properly held (Pet. App. A21) that "State and local governments are not required to approve or prohibit anything" and correctly rejected petitioners' Tenth Amendment claims.

Petitioner CAPTF contends (Pet. 16) that the decision below conflicts with the decision of the Fourth Circuit in *Petersburg Cellular Partnership* v. *Board of Supervisors*, 205 F.3d 688 (2000) (per curiam). In that case, the Fourth Circuit upheld a county's decision to permit a communications tower to be built, but there was no agreement on a single rationale. Only a single judge, Judge Niemeyer, would have upheld the county's decision on the ground that certain federal limitations on the county's decision violated the Tenth Amendment. See *id.* at 691; *id.* at 696-705 (opinion of Niemeyer, J.).[8] Accordingly, the Fourth Circuit did not take a position regarding the Tenth Amendment issue

[8] The other judge voting to uphold the county's decision based his determination on the ground that the county's decision did not violate any provision of the Telecommunications Act. 205 F.3d at 706-710 (opinion of Widener, J.). The third judge dissented from the court's disposition, on the ground that the county's decision did violate a provision of the Act and that that provision did not violate the Tenth Amendment. *Id.* at 710-720 (opinion of King, J.).

in that case, and the Fourth Circuit's decision in that case therefore does not conflict with the decision of the Second Circuit here.[9]

Also without merit is the claim of CAPTF (Pet. 21) that the decision below conflicts with *Alden* v. *Maine*, 527 U.S. 706 (1999), because, in petitioner's view (Pet. 22), the federal government has allegedly "defaulted on its obligation to protect public health," and it therefore "may not simultaneously *prevent the States from taking action to do so.*" The proposition on which petitioner relies—that federal courts must analyze whether a federal law adequately protects the public health before permitting it to preempt state law—has nothing to do with the Court's decision in *Alden*, which addressed Congress's power to authorize lawsuits against a State in its own courts under federal law.[10] In any event, the court below correctly found that the FCC's RF exposure standards, which were formulated by expert scientific groups that reviewed exhaustive studies and were supported by every federal health and safety

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[9] In any event, even the position urged by Judge Niemeyer in his concurring opinion in *Petersburg Cellular* does not conflict with the decision of the court below in this case. Judge Niemeyer's opinion expressed his belief that 47 U.S.C. 332(c)(7)(B)(iii), which requires a state or local decision regarding the placement of cellular towers to be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), violates the Tenth Amendment. He appears to have accepted that the provision at issue here—47 U.S.C. 332(c)(7)(B)(iv)—is constitutional. 205 F.3d at 703-704.

[10] Insofar as petitioner's real claim has to do with Congress's spending priorities, see CAPTF Pet. 24-28, petitioner has no standing to air generalized grievances about those priorities. See *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

agency, provide adequate protection to the public. Pet. App. A9.

3. The court of appeals found that the FCC was not required to prepare an environmental impact statement because the rulemaking process, which extensively considered the environmental effects of RF energy, amounted to "functional compliance" with NEPA; the rulemaking was, the court held, equivalent to an EA and a FONSI. Pet. App. A17-A18. Petitioner Cellular Phone Taskforce contends (Pet. 9-12) that the decision conflicts with decisions of other courts holding that the functional compliance test may lawfully be applied only to actions of the EPA and not to the actions of other federal agencies.

Petitioner's claim is incorrect. No federal regulation, statute, or other source of law prohibits the application of the functional compliance test to agencies other than EPA. The cases cited by petitioner either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA. None of them held that the test could not be applied in any circumstances to any other agency. There is thus no conflict.

As a matter of policy, the Executive Branch believes that the functional compliance test should not be applied to agencies other than EPA, and the government therefore does not ordinarily argue that environmental analyses conducted by agencies other than EPA functionally comply with NEPA. Because that policy has not been expressed in any formal manner, such as regulation or other publication, the Second Circuit did not commit legal error when it found that the FCC had functionally complied with NEPA. Moreover, in light of the extensive scientific analysis performed by the standard-setting organizations that crafted the FCC's guidelines (as well as the commentary received by the

FCC from pertinent federal agencies, including EPA), the finding below that the FCC had functionally complied with NEPA was supported by the record. Further review of the court of appeals' application in this case of the "functional compliance" test is accordingly not warranted.

In any event, the Second Circuit's judgment was correct for a reason other than the one on which it relied. The court's reasoning on this point implicitly assumes that some kind of environmental analysis was required. We argued before the court of appeals, however, that an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS. The Seventh Circuit adopted that position in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000).

As CEQ has interpreted and implemented NEPA, each federal agency specifies which of its actions will be subject to environmental analysis. 40 C.F.R.1507.3. Under the CEQ's approach, which is "entitled to substantial deference," *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), an agency's regulations to determine when to prepare an EIS are not themselves subject to the EIS requirement. Rather, such rules are "more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C)," and the categories specified by the rules "are not proposed actions, [but] categories of actions for which an EA or EIS has been deemed unnecessary." *Heartwood*, 230 F.3d at 953. The rules do not "authoriz[e] any activity or commi[t] any resources to a project that might impact the environment." *Id.* at 954. Accordingly, rules such as the FCC's rules in this case implementing

NEPA are not subject to the requirement that what might be termed a "meta-EIS" must be prepared.

4. Petitioners Worsham, Cellular Phone Taskforce and Fichtenberg contend that Congress impermissibly delegated to the FCC the authority to promulgate the RF exposure rules. Worsham Pet. 14-16; CPT Pet. 18-22; Fichtenberg Pet. 31-32. They claim that Congress articulated no "intelligible principle" to guide the FCC's determination of the issue. The court below did not address that issue, and on that ground further review is therefore not warranted.

In any event, the FCC's authority to promulgate the RF regulations does not violate the Constitution. Congress may delegate its legislative functions to agencies "under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). In delegating its authority, Congress must only "lay down * * * an intelligible principle to which the [agency] is directed to conform" in order for the delegation to be constitutional. *Ibid.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Petitioners claim that the only congressional delegation of authority to the FCC to craft the RF rules is contained in Section 704(b) of the Telecommunications Act, which states that "[w]ithin 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." That delegation, they assert, provides constitutionally insufficient guidance.

Petitioners' argument rests on a fundamentally mistaken premise. Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Indeed, the FCC first

implemented RF rules in 1985, and it began the rulemaking under review three years before the passage of the Telecommunications Act. The agency thus acted under its broad authority to regulate communications conveyed by the Communications Act of 1934.

The FCC issues licenses to use the electromagnetic spectrum pursuant to 47 U.S.C. 307(a), which accords the agency authority to grant licenses "if public convenience, interest, or necessity will be served thereby." Accord 47 U.S.C. 309(a). The public interest standard continues to be the touchstone of FCC regulation. In connection with its licensing function, Congress has granted the FCC the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Communications Act. 47 U.S.C. 303(r); accord 47 U.S.C. 154(i); 47 U.S.C. 303(f) (1994 & Supp. IV 1998). The Commission also has direct authority to "determine the power which each station shall use," 47 U.S.C. 303(c) and to "[r]egulate the kind of apparatus to be used with respect to its external effects," 47 U.S.C. 303(e). This Court long ago held Congress's expansive delegation of authority to the agency to be constitutional. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943). The Court ruled that the "public interest" standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Id.* at 216 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). Those cases foreclose petitioners' delegation argument.[11]

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[11] Petitioners CPT and Worsham appear to claim (CPT Pet. 20-21; Worsham Pet. 16) that the decision below conflicts with *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999),

Petitioner Worsham further asserts (Pet. 14-15) that it violated the delegation doctrine to give the FCC authority to establish standards in a health and safety field in which the agency acknowledged it lacked expertise. That argument is mistaken.

The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it "the policy of the United States to encourage the provision of new technologies and services to the public," 47 U.S.C. 157(a), and has established procedures to ensure the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

To be sure, the Commission stated that it "does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies."

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cert. granted, 120 S. Ct. 2003 (No. 99-1257) and 120 S. Ct. 2193 (No. 99-1426). Those cases involve a substantially different regulatory scheme than does this case, and the resolution of those cases is unlikely to affect the settled analysis of the Communications Act delegation of authority to the FCC, as directly upheld by this Court in cases such as *National Broadcasting Co.* and *Pottsville Broadcasting Co.*

RF Reconsideration Order, 12 F.C.C.R. at 13,538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to "*develop* our own radiation exposure guidelines," but "does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI." 100 F.C.C. 2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order*, 11 F.C.C.R. at 15,129-15,131; *RF Reconsideration Order*, 12 F.C.C.R. at 13,538. EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead. There was no constitutional infirmity in that process.

5. Petitioner Cellular Phone Taskforce claims (Pet. 12-15) that the court below erred in finding that the FCC did not violate the Administrative Procedure Act. CPT argues that during the reconsideration proceeding the FCC was required to solicit the comments of the health and safety agencies on new record material concerning "non-thermal" effects. The court of appeals properly rejected that claim of error.

By the time of its first order, the FCC had already consulted extensively with all of the federal health and safety agencies; the discussions included possible non-thermal effects of RF energy. See Pet. App. A7-A16. Moreover, ANSI and NCRP had reviewed extensive scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence. *Id.* at A9. As the FCC found, no further consultation

was needed: "we have considered carefully well over 150 sets of comments filed in this proceeding and have already consulted extensively with all of the relevant health and safety agencies." *RF Reconsideration Order*, 12 F.C.C.R. at 13,506. As found in an analogous context, "[i]t is not enough that the [new] information may be worthy of further inquiry or may be considered important research. [The question is] whether or not the new information presents a seriously different picture" than that originally envisioned. *Wisconsin* v. *Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The court of appeals correctly concluded that "it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid." Pet. App. A9-A10.[12]

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[12] Petitioner CPT claims (Pet. 15) that it was arbitrary for the FCC to have "eschewed serious health-agency evaluation * * * while simultaneously disclaiming its own expertise." The court below found that the FCC "could reasonably expect [the health and safety] agencies to keep abreast of scientific developments" and "expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration." Pet. App. A10. Petitioner does not challenge that finding. Indeed, in a letter which we provided to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j), EPA recently informed the agency that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. * * * The majority of currently available studies suggests * * * that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees." Letter from Robert Brenner, Acting Deputy Assistant

Petitioner Fichtenberg raises the additional administrative law claim that the FCC without explanation switched from an earlier RF exposure standard that required exposure to be "as low as reasonably achievable" (ALARA) to the current standards. Fichtenberg Pet. 28-31. Contrary to petitioner's assertion (Pet. 28), ALARA was never the standard; rather petitioner urged that the agency make it the standard.[13] The FCC explained that a very low standard would not strike a proper "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Reconsideration Order*, 12 F.C.C.R. at 13,496. The court below affirmed that finding (Pet. App. A11-A12), and there is no cause to question that conclusion.

6. Finally, petitioner CPT's claim (Pet. 23-25) that the court of appeals improperly rejected its claim under the Rehabilitation Act lacks merit. The argument is that the decision below conflicts with decisions of other courts of appeals that local zoning is a "program or activity" of the relevant governmental unit.

The Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), bars discrimination against or denial of benefits to an "otherwise qualified individual with a disability" on the basis of the handicap "under any

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Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999).

[13] The requirement of 47 U.S.C. 324 that transmitters "use the minimum amount of power necessary to carry out the communication desired" pertains to interference between stations, not potential health effects of RF fields, which were unknown in 1934 when Section 324 was enacted.

program or activity conducted by any Executive agency." Petitioner claimed below that the proliferation of transmitters was causing discrimination against persons especially sensitive to RF fields. The court of appeals held that "CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any 'program or activity' of the FCC," and it dismissed the charge. Pet. App. A25.

That holding was correct. The FCC's regulations implementing the Rehabilitation Act expressly state that the rules do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6). Both this Court and the D.C. Circuit have affirmed that approach. *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 840 F.2d 88 (D.C. Cir. 1988).

That reasoning defeats petitioner's contention that the Second Circuit's judgment conflicts with the decision of the Ninth Circuit in *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725 (1999). That case applied the Rehabilitation Act to the zoning activities of a governmental unit. The FCC does not engage in zoning activities, and Congress's preemption of certain aspects of local zoning decisions does not render the FCC a zoning administrator. There is no conflict between the decision under review and that of the Ninth Circuit.[14]

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[14] Petitioner CPT also raises (Pet. 24-25) a number of procedural complaints about the FCC's alleged failure properly to address petitioner's Rehabilitation Act claims. Those complaints are effectively moot in light of the Second Circuit's decision on rehearing to address petitioner's arguments on the merits and its ruling on

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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the merits that the FCC's orders in this case did not violate the Rehabilitation Act. See Pet. App. A25.

(4)

No. 00-427

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In The

Supreme Court of the United States

CELLULAR PHONE TASKFORCE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* Disability Council Of The White Mountains, Oregon State Rehabilitation Council, Unitarian Universalist Association, The Jeremiah Project, National Center For Environmental Health Strategies, National Coalition For The Chemically Injured, Chemical Injury Information Network, Inc., Environmental Health Network Of California, Environmental Health Association Of California, Ecology House, Inc., Health And Habitat, Inc., Citizens' Task Force On Radiation Exposure, Joy Rothenberg, Linda J. Allen, Scott Hamilton Dykes, Richard Kimball, Marta Sonnenblick, Richard Uhtenwaldt, Sylvia Williamson, and Louise Yost in support of Petition for a Writ of Certiorari

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QUESTION PRESENTED

Whether federal agency rulemaking, which sets standards for a pervasive industry, and which preempts local government zoning decisions regarding that industry, constitutes a "program or activity" under section 504 of the Rehabilitation Act, requiring adherence to its provisions.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the petition of the Cellular Phone Taskforce on the Rehabilitation Act issue.[1]

OPINION BELOW

The opinion of the Court of Appeals on the Rehabilitation Act issue is reported at 217 F.3d 72 (2d Cir. 2000) and appears in the appendix of petitioners, Citizens for the Appropriate Placement of Telecommunications Facilities, *et al.*, hereafter cited as "App.," at A-23-25.

INTERESTS OF *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of the following disability organizations and individuals with disabilities. The concern of *amici* is that the exemption of federal agency rulemaking from the Rehabilitation Act has created a loophole which eliminates protections previously accorded persons with disabilities at local, state, and federal levels.

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[1] No counsel for any party authored this brief, either in whole or in part. Furthermore, no persons other than *amici curiae*, their members or their counsel contributed financially to the preparation of this brief. The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court.

People with disabilities are protected against discrimination by federal agencies (§ 504 of the Rehabilitation Act ("RA"))[2], and by states and public entities (Title II of the Americans with Disabilities Act ("ADA"))[3]. But, bizarrely, under this court of appeals decision, disabled persons lose their protections against discrimination by both states and public entities if a federal agency so orders. Neither the ADA nor the RA applies, said the court of appeals. The implications for the nation's 54 million[4] people with disabilities are serious and urgent.

Some of the *amici curiae* are individuals or organizations of individuals with chemical and electrical sensitivities. The United States Architectural and Transportation Barriers Compliance Board ("The Access Board") has written,

> Over the years, the Access Board has learned about the very important needs of people with multiple chemical sensitivities and electrical sensitivities. We have heard from thousand[s] of people across the country who are sensitized to chemicals and electromagnetic, radio, and cell phone emissions . . . [5]

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[2] 29 U.S.C. § 794.

[3] 42 U.S.C. § 12131 *et seq.*

[4] This is the current estimate of the National Council on Disabilities.

[5] Letter of October 26, 2000 from James Raggio, General Counsel of the Access Board. The letter is reproduced in the appendix to this brief. The Access Board is a federal agency which develops and enforces accessibility guidelines under the ADA, the Architectural Barriers Act, and the Telecommunications Act.

IDENTIFICATION OF *AMICI CURIAE*

The following organizations, individuals, and government agency have authorized the preparation and filing of this brief as friends of the Court on their behalf.

DISABILITY COUNCIL OF THE WHITE MOUNTAINS, a non-profit organization founded in 1994 focusing on issues of disability in Navajo and Apache Counties, Arizona.

OREGON STATE REHABILITATION COUNCIL ("SRC"), an advisory board appointed by the Governor, pursuant to the Rehabilitation Act, 29 U.S.C. § 725. SRCs work in partnership with State Vocational Rehabilitation agencies in carrying out State responsibilities under Title I of the RA.

UNITARIAN UNIVERSALIST ASSOCIATION, a religious organization of 1,051 congregations that recognizes accessibility as an issue of social justice.

THE JEREMIAH PROJECT, an outreach ministry of the Presbyterian Church (USA) for people disabled by chemical injury.

NATIONAL CENTER FOR ENVIRONMENTAL HEALTH STRATEGIES ("NCEHS"), a 5,000 member non-profit education and advocacy organization founded in 1986 and focused on indoor air quality, chemical sensitivities, and environmental disabilities. NCEHS was involved in the creation and passage of the Americans with Disabilities Act and was invited to the signing of the Act.

NATIONAL COALITION FOR THE CHEMICALLY INJURED ("NCCI"), a national non-profit education and

advocacy organization founded in 1996 with twelve affiliated support groups for people with chemical injury and related disabilities. NCCI has presented briefings invited by the Access Board.

CHEMICAL INJURY INFORMATION NETWORK, INC. ("CIIN"), a national non-profit educational and support network for people with chemical injury, founded in 1990. CIIN has given testimony before Congress, and has prepared invited reports on chemical injury for the Department of Health and Human Services, the Centers for Disease Control, and the U.S. Interagency Taskforce on Multiple Chemical Sensitivity.

ENVIRONMENTAL HEALTH NETWORK OF CALIFORNIA ("EHN"), a non-profit organization founded in 1987 promoting public awareness of environmental sensitivities and their causative factors and advocating on resulting issues of access. EHN has been active since before the passage of the ADA in advocating in California and nationally for accessibility for people with environmental disabilities.

ENVIRONMENTAL HEALTH ASSOCIATION OF CALIFORNIA, a non-profit organization founded in 1980 and based in the Los Angeles area, providing support, information, and advocacy for people with multiple chemical sensitivities and related disabilities, such as electrical sensitivity.

ECOLOGY HOUSE, INC., a federally funded non-profit housing project in San Rafael, California designed and built for people disabled by multiple chemical sensitivities.

HEALTH AND HABITAT, INC., a non-profit organization based in Mill Valley, California, providing education and research on the connection between the environment and health, working to preserve natural habitats, and promoting healthy housing.

THE CITIZENS' TASKFORCE ON RADIATION EXPOSURE, a citizens' group in Santa Fe, New Mexico representing 1,000 people who have signed a petition opposing cellular communication towers in residential areas.

Joy Rothenberg, Corresponding Secretary of the New York City chapter of the Human Ecology Action League ("HEAL") (participating as an individual). HEAL is a national support organization for people with environmental disabilities.

Linda J. Allen, Scott Hamilton Dykes, Richard Kimball, Marta Sonnenblick, Richard Uhtenwaldt, Sylvia Williamson, and Louise Yost, individuals disabled by electrical and/or chemical sensitivities.

SUMMARY OF ARGUMENT

The Federal Communications Commission ("FCC") rules at issue regulating radiofrequency ("RF") exposure from the telecommunications industry became effective in August 1996. Since that time the buildout of wireless communication facilities has been so rapid that there is hardly any corner of the country left which is not subject to their effects. RF radiation has known effects on biological systems, and on electronic equipment, including

medical and adaptive equipment required by many individuals with disabilities.

Amici respectfully urge that the court of appeals' decision, exempting this FCC rulemaking from the provisions of both the ADA and the RA, is not consistent with the intent or the substance of either, or with the implementing regulations of the FCC itself, and is in conflict with previous decisions of several circuit courts and this Court. *Amici* further urge that the exception to the nondiscrimination laws embodied in this decision would have broad effects far beyond the electrically sensitive, encompassing every type of disability and every type of architectural or other barrier. If agency rulemaking is not a "program or activity" of the agency requiring compliance with the RA (App. A-25), then any federal agency may regulate any industry without regard to the effects of the regulations on persons with disabilities.

The rules in question here not only regulate a pervasive and rapidly growing industry, but preempt state and local government zoning decisions regarding the health effects of that industry. This is precisely the type of situation in which government should be most vigilant to safeguard the rights of those likely to be most affected by this industry, instead of creating new and broad exceptions which abrogate their rights.

ARGUMENT

I. THE SECOND CIRCUIT'S LIMITATION OF THE SCOPE OF THE REHABILITATION ACT ABROGATES THE RIGHTS OF DISABLED PERSONS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

Petitioner's RA complaint states that:

> On August 6, 1996 the Federal Communications Commission (FCC) adopted into effect its Report and Order in the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62. This action by the FCC discriminates against electrosensitive individuals, numbering at least 2% of the population of the United States.

(App. A-40). The court of appeals refused to rule on the merits of this claim, stating instead that this rulemaking does not fall within "the scope of the Rehabilitation Act's protections" because it is not a " 'program or activity' " within the meaning of the Act (App. A-25).

But the courts, and the federal agencies themselves, including the FCC, have interpreted the language of the RA more broadly. In the case of federal aid recipients, Congress clarified in 1988 that "program or activity" means "all of the operations" of the recipient, 29 U.S.C. § 794(b). *See National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 466 and n.3 (1999).[6]

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[6] The Civil Rights Restoration Act, Pub.L.No. 100-259, amended Title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of

In the case of the federal agencies themselves, the Department of Justice, which was responsible for coordinating the implementation of § 504 of the RA,[7] has provided a similar definition: "Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does." 49 Fed. Reg. 35724, 35725 (1984), Final Rule, Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs. The opinion of the Department of Justice, as the responsible agency, is entitled to controlling weight. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

The legislative history of § 504 supports this interpretation. When it was amended in 1978 to apply to Executive agencies, Representative James Jeffords, an author of the bill, stated during the debates on the conference report:

> Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function

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1975, and Title VI of the Civil Rights Act of 1964, all with nearly identical language, to broaden the definition of "program or activity" to include "all of the operations" of a recipient of federal funds. This overturned the Supreme Court's earlier decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), which had given the phrase "program or activity" a narrower meaning.

[7] *See* Executive Order 12250, § 1-201(c).

> or activity in every department or agency of the Federal Government.

124 Cong. Rec. 38,551 (1978).

In agreement with these broad definitions, and in conflict with the Second Circuit's decision, ample case law has recognized that agency rulemaking is subject to the RA. *See Cousins v. Secretary of the U.S. Department of Transportation*, 880 F.2d 603 (1st Cir. 1989) (en banc); *Clark v. Skinner*, 937 F.2d 123 (4th Cir. 1991); *Simms v. NHTSA*, 45 F.3d 999 (6th Cir. 1995). Until now, it appears that no circuit court has questioned the applicability of § 504 to agency rulemaking activity.

The *Simms* case bears striking parallels to the instant case. Petitioners were challenging the validity of National Highway Traffic Safety Administration safety standards for the safe transportation on school buses of students in wheelchairs. They alleged that the standards were not stringent enough. The court noted:

> [T]he petitioners, seeking a change in an Executive agency regulation, presented a claim under the Rehabilitation Act to the agency at the initiation of the rulemaking process and participated in this process every step of the way until a final rule issued. They then followed the prescribed procedure by seeking review in the court of appeals, rather than mounting a collateral attack on the regulations in district court. Under these circumstances, we agree with the courts which have held that the Rehabilitation Act claim is properly before the court of appeals pursuant to a petition for review.

Id. at 1010.

The Supreme Court also considered a § 504 challenge to agency rules in *Traynor v. Turnage*, 485 U.S. 535 (1988). Petitioners had challenged a Veterans Administration regulation defining primary alcoholism as "willful misconduct" (thereby disqualifying alcoholics from receiving certain benefits). This Court assumed, without comment, that the RA applied, and specifically decided that petitioners' § 504 claim was entitled to judicial review. 485 U.S. at 545.

The Second Circuit's decision in the instant case conflicts not only with the cases cited above, but with the FCC's own regulations implementing the RA.

A. The FCC Must Comply With the Rehabilitation Act When Issuing Safety Standards For Licensees.

The FCC's own rules implementing the RA are sweeping. Although the FCC's licensees are not themselves covered by the RA, all of the FCC's own activities related to its licensees, including rulemaking, are so covered. 47 C.F.R. §§ 1.1830(b)(3) and (6), App. A-35-36. And, in its analysis of these provisions, the FCC specifically said that "the Commission must comply with these nondiscrimination requirements when establishing safety standards for the operations of licensees." Report and Order, 2 FCC Rcd Vol. 8 2199, 2203 (1987), App. A-38.

The FCC further elaborated that although its licensees are not covered by the RA, § 504 may indirectly affect aspects of their operations because it covers "the content of the rules established by the agency for the

operation of the program or activity of the licensee." *Id.* at 2204, App. A-38.

Furthermore, the Second Circuit's decision conflicts with *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, this Court held that a school board is liable for sex discrimination by third parties over whom it exercises authority, when its "own deliberate indifference effectively 'cause[d]' the discrimination," 526 U.S. at 642-3, citing *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 291 (1998).

The instant case goes beyond deliberate indifference. The FCC deliberately set rules for its licensees in terms that inescapably affect large numbers of persons with disabilities. This is an action *of the FCC* which is subject to § 504 of the RA.

B. Federal Agencies Must Comply With the Rehabilitation Act When Regulating State and Local Governments.

When a federal agency, as in this case, preempts one or more functions of state and local government, people with disabilities retain their protections under the nondiscrimination laws, absent clear Congressional intent to abrogate them. It would be an absurd result if the mere transfer of jurisdiction over the environmental effects of RF radiation from one entity covered under a nondiscrimination law (the states) to another entity covered under a nondiscrimination law (the FCC) extinguished both laws. Yet in this case, the Second Circuit has ruled that in such a situation neither the ADA nor the RA any longer apply (App. A-25).

As the Cellular Phone Taskforce writes in its petition for certiorari, both the Ninth and Second Circuits have ruled that zoning is a normal function of government and therefore is covered by the provisions of the RA and the ADA. *See Bay Area Addiction Research v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999); *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 44 (2nd Cir. 1997). In discussing the phrases "program or activity" (RA) and "service, program, or activity" (ADA), the Second Circuit, in *Innovative Health Systems*, said, "it is a catch-all phrase that prohibits all discrimination by a public entity regardless of context, and that should avoid the very type of hair-splitting analysis the City attempts to make here." *Id.* at 45.

Yet this same type of hair-splitting analysis has been used by the same court to abrogate the rights of persons with disabilities in the instant case. Since the FCC's rule precludes zoning decisions on the very issues that affect many disabled people, the rule itself constitutes a zoning decision subject to nondiscrimination laws. The transfer of jurisdiction over these decisions from the states to the FCC cannot extinguish the protections granted by law to persons with disabilities.

II. THE SECOND CIRCUIT'S LIMITATION OF THE SCOPE OF BOTH THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT CONFLICTS WITH THE CLEAR INTENT OF CONGRESS TO PROTECT DISABLED PERSONS.

In the Rehabilitation Act of 1973, Pub.L.No. 93-112, Congress noted that handicapped individuals have

historically been underserved. Congress proscribed discrimination against an individual "by reason of her or his handicap" under any program or activity receiving Federal financial assistance. 29 U.S.C. § 794(a).

In 1974, Congress clarified that the proscription extended beyond employment to other types of discrimination (Rehabilitation Act Amendments of 1974, Pub.L.No. 93-516).

In 1978, Congress again amended the Rehabilitation Act to extend the proscription against discrimination to all Executive agencies and the United States Postal Service (amendment to 29 U.S.C. § 794, The Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub.L.No. 95-602).

In 1990, in the Americans with Disabilities Act, Pub.L.No. 101-336, "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.' See § 12101(a)(2)." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). Title II of the ADA extended the proscription on discrimination to states, local governments, and public entities. At that time the number of Americans with disabilities was said to be "some 43,000,000." 42 U.S.C. § 12101(a)(1).

It is clearly the intent of Congress that individuals with disabilities be protected from discrimination by both federal and state entities, and the instant case reveals a situation in which federal preemption under the Commerce Clause implicates federal and state governments at the same time. Petitioner Cellular Phone Taskforce alleged that the FCC's rules violate the RA, and that they prohibit the states from enforcing the ADA, in violation

of that Act aiso. The court of appeals' ruling that when the FCC regulates states, both RA and ADA protections vanish, is a result which removes the protections afforded people with disabilities and in effect allows abrogation of their rights by the Commerce Clause. This is directly contrary to the stated intent of Congress, which is to invoke the power "to regulate commerce" to *enforce* nondiscrimination, not to abrogate it. 42 U.S.C. § 12101(b)(4).

III. EFFECTS OF THIS CASE ON OTHER DISABILITIES

A. Hearing Aids, Wheelchairs, and Medical Devices

This Court has recently denied certiorari in two cases on the issue of radiofrequency interference. In *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000), *cert. denied*, 148 L.Ed.2d 201 (2000), and in *Southwestern Bell v. Johnson County Board*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 147 L.Ed.2d 234 (2000), the courts of appeals held that the FCC has exclusive authority over interference with electronic devices, and that states and local governments may not regulate in this area. Yet if the Second Circuit's decision in the instant case is allowed to stand, the FCC will be allowed to regulate in this area without complying with any nondiscrimination statute.

The plaintiffs in *Burlington Broadcasters* brought suit because local broadcast facilities were causing widespread interference with hearing aids, computers, televisions, telephones, etc. This type of interference also affects electric wheelchairs, pacemakers, and various other medical devices.

The record of the instant case contains ample evidence of the seriousness of these problems:

Testing by Jon Short at BT Laboratories in England in 1992 established that hearing aids are subject to annoying interference from digital cellular apparatus. "The critical field strength is around 4 V/m for perceptible, annoying interference." JA 973.[8] This corresponds to a power density of 42 microwatts per square centimeter, which is more than 100 times less power than the exposure allowed by the FCC's rules.[9]

On June 5, 1995, the Hear-It Now Coalition submitted a petition for rule-making to the FCC asking it to mandate that wireless technologies be made compatible with hearing aids and medical devices. JA 971.

On February 28, 1996, San Diego Mayor Susan Golding wrote a letter to the FCC presenting evidence of interference by wireless facilities with hearing aids, electric wheelchairs, pacemakers, and other devices. She asked the FCC to what extent its regulations preempt the City of San Diego from regulating to prevent such interference. Chairman Reed E. Hundt of the FCC responded on March 15, 1996: "The Communications Act of 1934, as

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[8] "JA" refers to pages of the Joint Appendix submitted to the court of appeals.

[9] At 800 MHz and 1900 MHz, the two frequencies currently used for cellular phones in the U.S., the FCC's rules allow an exposure to the general population of 533 microwatts per square centimeter and 1000 microwatts per square centimeter, respectively. See Table 1(B) of Report and Order, 11 FCC Rcd 15123 (1996), lodged with the Court, at p. 93.

amended, provides the FCC exclusive jurisdiction over radio frequency interference."[10]

On March 22, 1996, Dr. Ken Joyner of Telstra (an Australian telecommunications company) and Dr. John Causebrook of Vodafone (a British telecommunications company) wrote a letter to *Microwave News* stating,

> We have conducted extensive testing of the potential of cellular telephones to interfere with the operation of medical electrical equipment and consulted with manufacturers of that equipment. Our conclusion is that medical electrical equipment should not be exposed to levels above 1 V/m from mobile radio installations.

JA 942. One volt per meter corresponds to 0.27 microwatts per square centimeter, which is more than 2000 times less power than the exposure levels allowed to the general population by the FCC's rules.

B. Other Disabilities

The Second Circuit's decision sets a broad precedent. If the setting of rules by federal agencies is not subject to any nondiscrimination law, this affects every mental and physical disability, and every type of architectural or other barrier – not just electromagnetic barriers.

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[10] Letter from Reed Hundt to Susan Golding, p. 6, attachment to comments submitted by Cellular Telecommunications Industry Association, docket entry of June 24, 1996, JA 164.

IV. THE QUESTION IS IMPORTANT AND URGENT.

The protections afforded 54 million Americans with disabilities are at issue in this case. For some – people who use hearing aids, those who use electric wheelchairs, those with pacemakers implanted, and others dependent on electronic medical or adaptive devices – the particulars of this case make the question of pressing importance.

For those directly medically vulnerable to RF radiation (such as people with some forms of epilepsy, certain heart conditions, and other electrically sensitive people), the question cannot wait. Their numbers may exceed 8 million in the U.S., according to the results of the 1998 California Adult Tobacco Survey. The random survey of 2,072 adults, conducted by the California Department of Health Services in Oakland, revealed that 3.3% reported being electrically sensitive. The authors of this study noted that this is a much higher prevalence than reported in previous estimates.[11]

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[11] P. Levallois, *et al.*, "Prevalence of Self Reported Electrical Hypersensitivity and Associated Factors in California." *Proceedings of the Twenty-Second Annual Meeting of the Bioelectromagnetics Society*, Munich, Germany, June 11-16, 2000, pp. 268-269. This study is part of the California EMF research program, which is mandated by the Public Utilities Commission and financed by California utilities.

CONCLUSION

For the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for a Writ of Certiorari of the Cellular Phone Taskforce on the Rehabilitation Act issue.

Respectfully submitted,

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December 4, 2000

Appendix 1

[SEAL]
United States
Architectural and Transportation Barriers Compliance Board

1331 F Street, NW Washington, DC 20004-1111
202-272-5434 (Voice)
202-272-5449 (TDD)
202-272-5447 (FAX)

October 26, 2000

Mr. Nelson French, Director
White Mountain Catholic Charities
Saint Anthony's Convent
6 N. McQuatters Avenue
P.O. Box 552
McNary, Arizona 85930

Dear Mr. French:

I am writing regarding The Dispossessed Outreach Project's plans to seek assistance from the Arizona Department of Commerce to develop housing for people with multiple chemical sensitivities and electrical sensitivities in West Yavapai County. The Access Board is a federal agency whose mission is to promote accessibility for people with disabilities. We develop accessibility guidelines for the built environment, transit vehicles, and telecommunications equipment, and standards for electronic and information technology. Our guidelines are adopted by other federal agencies as enforceable standards under the Americans with Disabilities Act, Architectural Barriers Act, and Telecommunications Act. We

also enforce accessibility standards for federally funded facilities.

Over the years, the Access Board has learned about the very important needs of people with multiple chemical sensitivities and electrical sensitivities. We have heard from thousand [sic] of people across the country who are sensitized to chemicals and electromagnetic, radio, and cell phone emissions and who cannot safely use facilities because of chemicals released from building materials and furnishings, exposure to certain types of electrical equipment and systems, and cleaning products and pesticides commonly used in operating and maintaining buildings. The Access Board is initiating a major project to examine the needs of people with multiple chemical sensitivities and electrical sensitivities as they relate to indoor environmental quality, and to develop an action plan to address those needs. We will be involving people with multiple chemical sensitivities and electrical sensitivities, the building industry, and other federal agencies, including the Environmental Protection Agency, in the project. We also are developing technical assistance materials that will focus on best practices for addressing the needs of this population.

Based on our experience, I can state that there definitely is a need for specially planned and designed housing for people with multiple chemical sensitivities and electrical sensitivities. There are many people with these and related disabilities whose condition is so severe that they cannot live in conventional housing. We recently visited Ecology House, an 11-unit apartment development in San Rafael, California; talked with its residents;

and learned first hand about the special design and construction practices that have made the project habitable for people who could not tolerate other housing. The housing project being planned by The Dispossessed Outreach Project would build on the experiences of Ecology House and meet a real need for healthy and affordable housing by people who have no other choices.

If I can be of further assistance, please call me at (202) 272-5451.

Sincerely,

/s/ James J. Raggio
James J. Raggio
General Counsel

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(5)

Supreme Court, U.S.
FILED
DEC 19 2000
CLERK

No. 00-427

In The

Supreme Court of the United States

CELLULAR PHONE TASKFORCE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. FUNCTIONAL COMPLIANCE. Respondents take the self-contradictory position that, while the Executive Branch as a matter of policy would limit use of the functional compliance doctrine to the EPA, this need not be a matter for the court's concern because "No federal regulation or statute, or other source of law prohibits the application of the functional compliance test to agencies other than the EPA." Respondents do, at least, acknowledge that cases which have considered the matter "either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA." Nevertheless, because the repeated statements of those courts could arguably be considered not a part of the holding of those cases, "There is thus no conflict." Brief for the Respondents in Opposition (hereafter, "Opposition"), at 17.

The very fact that respondents have made this argument – we like it as a policy but, gosh, we'll ignore it here – makes clear the need for this court to grant certiorari.

First, respondents have misstated the law. NEPA compels all federal agencies to satisfy its requirements absent clear and unavoidable conflict in statutory authority. *Flint Ridge Dev't Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-788, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976); 42 U.S.C. § 4332.

Second, a plain reading of the cases reveals that when the courts have been persuaded to carve out an exception to the unambiguously strict compliance mandated by NEPA, this narrow exception is based on an express statutory conflict which would otherwise necessitate duplicative or conflicting environmental review. How else are we to interpret statements such as those of

the courts in, for example, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C.Cir. 1973):

> "We add, finally, a word of clarification: we establish a narrow exemption from NEPA, for EPA determinations under Section 111 of the Clean Air Act. NEPA must be accorded full vitality as to non-environmental agencies as established by our outstanding precedents."

Or, similarly, in *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973), discussed in our Petition at 10-11.

Petitioner does not agree that it is dicta when a court expressly defines the limits of its holding (i.e., the scope of a narrow exception). Regardless, the Second Circuit's opinion in this case is the first to apply functional compliance to an agency other than the EPA and without any express statutory conflict with NEPA. It creates a clear conflict with other circuits, and, if followed, would virtually gut the procedural requirements of NEPA. Moreover, that respondents can argue at all that the "policy" limiting functional compliance to the EPA does not have the force of law cries out for this court's intervention. To leave this dangerous precedent in place would be to ignore the unambiguous statutory mandate from Congress which requires agency compliance with NEPA to the fullest extent possible.

Respondents further argue that NEPA compliance was unnecessary in the rulemaking under review here because "an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS." Opposition 18. Petitioner concedes that promulgation of purely procedural rules that implement NEPA may not require environmental assessment, assuming all the CEQ

and NEPA requirements were followed, but that was not the case here. The FCC was not simply promulgating procedural rules implementing NEPA; rather, it promulgated national RF exposure limits, and failed to comply with regulations requiring CEQ approval.

Respondents' reliance on *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947 (7th Cir. 2000), therefore, is misplaced, and again shows the extent to which this Court's intervention is necessary. In *Heartwood* the court affirmed Forest Service ("FS") procedural regulations determining what actions under its rulemaking jurisdiction qualify for a categorical exclusion ("CE") from additional NEPA review under CEQ regulations. *Id.* at 955. Moreover, the FS was found to have complied with the requirement of obtaining CEQ approval for the proposed revisions to its procedural regulations regarding CE's, as required by 40 CFR § 1507.3. *Id.* at 954-955; *see also* 950-951, ns. 2, 4. In the instant case, not only are the regulations at issue substantive rather than procedural, the record is silent regarding any such CEQ approval for the FCC.

As stated, however, the very fact of the government's assertion of *Heartwood* as controlling places into striking relief the necessity for this court to settle the limits of the functional compliance doctrine, lest this exception, should the opinion below stand, swallow the rule.

2. UNCONSTITUTIONAL DELEGATION. In opposition to petitioner's claim that the Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56, § 704(b) (hereafter, "TCA"), constitutes an unlawful delegation of authority by Congress, Petition 18-22, respondents assert, first, that the claim was not decided below, and second, that

authority is to be found not in the TCA but in the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.* (hereafter, "1934 Act"). Opposition at 19-22.

Regarding the first point, the issue was fully briefed in the Court of Appeals. See Brief for Cellular Phone Taskforce at 30-33 and Brief for Respondents at 44-45. That it was not specifically discussed in the Court of Appeals' Opinion does not mean it was not decided, but rather that it must have been included within the lower court's catch-all disposition: "We have considered petitioners' remaining constitutional arguments and find them to be without merit." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96-97 (2d Cir. 2000).

Regarding respondents' reliance on the 1934 Act as the source of the FCC's authority, rather than the TCA, the 1934 Act is similarly devoid of any intelligible principle to guide the FCC's rulemaking involving national health and safety standards. For example, respondents cite 47 U.S.C. §§ 307(a) and 309(a) as giving broad authority to "issue[ ] licenses to use the electromagnetic spectrum" with the public interest standard as the guiding principle for licensing and the concerns related thereto. Opposition 20. But respondents, elsewhere in their opposition, claim that the potential health effects of RF fields were unknown in 1934, Opposition 24, n.13, and none of the sections relied upon by respondents has been substantively amended since the 1930's (except § 309(j), added in 1993). Furthermore, the FCC's claim of authority stretching back to the 1930's is belied by their own disavowal of such authority much more recently than that:

> "The Commission's position is that it has neither the responsibility nor the authority to

establish health and safety radiation standards." Notice of Inquiry, Gen. Docket No. 79-144, 72 FCC 2d 482 (1979), ¶ 20.

All of the sections of the 1934 Act relied on by respondents, Opposition 20-21, have to do with engineering and promoting nationwide communications, not with health matters. Moreover, respondents' continued reliance on half-century-old cases, the most recent of which, *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), arose in the days when radio was flourishing, television was in its infancy, and cellular communications resided, if anywhere, in the annals of science fiction, highlights the need for certiorari to be granted in this case if otherwise the FCC will continue such unchecked expansion of its authority under the 1934 Act.

3. NEPA/APA CONSULTATION. The government continues to claim that the FCC's initial consultation with health-related agencies excused it from having to affirmatively seek their comment on the flood of new materials regarding the non-thermal biological effects of RF radiation on the reconsideration round. Opposition at 22-24. This is tantamount to asserting that a snapshot rather than a motion picture would adequately convey the experience of rafting through the Grand Canyon on the Colorado River. It is also contrary to law.

The FCC first promulgated guidelines on RF exposure caused by its licensees in 1985. The rulemaking at issue in this case began in 1993 as the FCC's attempt to update those guidelines. Those guidelines needed to be updated to respond to the rapid rate of change both in the devices using RF and to other scientific developments relating to RF exposure. Clearly, if this were a static field,

the guidelines would not have needed revision. Similarly, if this were a static field, there would have been no need for additional consultation with the health and safety agencies during reconsideration, three years later.

Respondents, however, continue to assert that "the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies", Opposition 22-23, while ignoring the critical issue of the three year lag time after the majority of the consultation occurred. The failure to consult regarding the thousands of pages of additional information and new studies received between 1993 and 1997 is like the snapshot from the Colorado – it is simply insufficient to depict reality.

Similarly, the validity of respondents' reliance on the adequacy and timeliness of the ANSI and NCRP reviews of the scientific literature, Opposition 22, is belied by the record below. The NCRP guidelines state that "A response by an organism to RFEM radiation may have a thermal basis, an athermal basis, or a combined basis." Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields, NCRP Report No. 86 (1986), p. 276, Joint Appendix (below, "JA") 304. And the EPA, in their comments to the initial FCC proposals, warned, "The thesis that the 1992 ANSI/IEEE recommendations are protective of all mechanisms of interaction is unwarranted because the adverse effects level in the 1992 ANSI/IEEE standard is based on a thermal effect." Comments of EPA, Nov. 9, 1993, p. 3, JA 439. So, again, by 1996, the scientific scenery had so shifted, as exemplified by the thousands of pages of new material submitted into the record after 1993, that this reliance on pre-1993 reviews of literature borders on the ludicrous, and fails to

qualify as rational rulemaking as required by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The irrationality of the rulemaking is compounded by the fact that most of the research relied upon by ANSI pre-dated December 1985, the cut-off date ANSI used for developing its 1992 standards, which the FCC later relied upon for its 1996 rules. IEEE Standard of Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz (1992), at 26, JA 356.

Respondents claim that petitioner does not challenge the Second Circuit's finding that "the FCC 'could reasonably expect [the health and safety] agencies to keep abreast of scientific developments' and 'expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration.' " Opposition at 23, n.12. Not so. If that were so, there would have been no reason for petitioner to present Question 2 in its Petition. If the evidence in the record supported that the health and safety agencies had actually evaluated the recent research in the record, Question 2 would be moot. Petitioner does not dispute that the FCC did consult with the expert agencies regarding the content of its proposed rule. But no evidence in the records suggests that the health and safety agencies ever evaluated, or were even aware of, the content of the public submissions into the FCC's rulemaking docket, either in the first instance or on reconsideration. Indeed, the record reveals the opposite to be true. In the May 19, 1999 letter from the EPA's senior scientist on RF radiation, Norbert Hankin, to Arthur Firstenberg, Mr. Hankin states that, to his knowledge, "the FCC has not asked EPA to review and evaluate any of the materials in the FCC's

docket ET-93-62, other than the April 1993 Notice of Proposed Rulemaking. . . . "[1]

Respondents' reliance on *Wisconsin v. Weinburger*, 745 F.2d 412 (7th Cir. 1984), Opposition 23, is misplaced. The FCC says the picture was not seriously different, but their answer is based on information that was at least three years old in a rapidly changing scientific environment. Many of the studies submitted to the FCC called into question the propriety of ignoring the potentially significant non-thermal damage and the validity of the threshold limits for thermal damage in biological systems. This directly called into question the fundamental scientific understanding underlying the ANSI and NCRP standards, and therefore presented a seriously different picture. *Id.* at 420. For respondents to say, therefore, that it was reasonable to continue to rely on the "fundamental scientific understanding underlying the ANSI and NCRP standards" absent new scientific evidence that they were invalid, Opposition at 23, bootstraps the question into the conclusion. The FCC is saying that it does not have to review the literature suggesting that those standards are wrong, or send it to the knowledgeable agencies for review, because no one has shown (except, of course, in the very literature being ignored) that the standards are no longer valid.

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[1] The letter is reproduced, with errors, in the appendix of David Fichtenberg's *pro se* Petition in No. 00-407, at 45. Although two lines of text were omitted and there were other typographical errors, the relevant substance of the letter as reproduced there is adequate for present purposes. The letter was submitted to the Court of Appeals in response to the Rule 28(j) submission of the FCC, cited in the Opposition Brief at 23-24, n.12.

The FCC's failure, both in the first instance and on reconsideration, to "rationally consider the relevant evidence", *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1217 (D.C. Cir. 1983), by failing to present the new data for evaluation by the agencies with health and safety expertise, constituted a blatant violation of the APA and NEPA.

4. REHABILITATION ACT. Respondents contend that the FCC rulemaking did not constitute discrimination against electrically sensitive people under any "program or activity" of the FCC, and therefore the improper handling of Petitioner's Rehabilitation Act ("RA") complaint and the FCC rules were not in violation of the RA. Opposition at 24-25; Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* This argument was adopted by the court below in its opinion on rehearing. *Cellular Phone Taskforce v. FCC*, 217 F.3d. 72, 72-74 (2d Cir. 2000).[2]

The opinion below is in direct conflict with other circuits which have ruled on the merits of discrimination allegations arising from federal agency rulemaking, e.g., *Simms v. NHTSA*, 45 F.3d 999, 1009-1010 (6th Cir. 1995), and other cases cited by *amici* the Disability Council of the White Mountains, *et al.* in their brief at 9-10. To reach the merits in each of those cases, the courts had to have accepted that agency rulemaking constitutes a "program or activity" under the Rehabilitation Act. Similarly, this court, in *Traynor v. Turnage*, 485 U.S. 535, 541-545, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), appears to take for granted that federal agency rulemaking constitutes a

---

[2] Petitioner erred in stating in its petition, at 1, that the opinion on rehearing was unpublished.

"program or activity" under the RA. Thus, there is a clear conflict with the decisions below in this case.

Moreover, respondents continue their misplaced reliance on *Community Television of So. Cal. v. Gottfried*, 459 U.S. 498, 500, 103 S.Ct. 885, 74 L.Ed.2d 705 (1983) and *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 92 (D.C. Cir. 1988). Opposition 25. The issue in those cases was the application of the RA to discrimination by FCC *licensees*. Those cases did not involve allegations of discrimination by the FCC.

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